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No. _____

In The

Supreme Court of the United States

LEONARD J. DAZET, JR., JAMES ANTHONY McDANIEL, DEMICO PERKINS, and all those similarly situated,

Petitioners,

v.

M. J. FOSTER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A clerk of criminal court and sheriffs statewide in Louisiana are collecting court costs for filing bond, serving notice, and release on bail from arrestees prior to conviction as a condition precedent to pretrial release on bail.

I. Is it constitutional for sheriffs and a clerk of court to collect court costs prior to conviction?

II. Is there a "limited" fundamental right to release from jail after one is found eligible for bail and posts bail? If so, does the amount really matter when charging for mere access to a fundamental right? The poll tax was only $1.50.

III. Can the federal courts ignore the Louisiana Supreme Court's interpretation of a Louisiana court cost statute because the decision is old?

PARTIES TO THIS PROCEEDING

Petitioners (class representatives): Leonard J. Dazet, Jr., James Anthony McDaniel, Demico Perkins

Respondents: Edwin A. Lombard, Clerk of Criminal District Court, Parish of Orleans, State of Louisiana, and all sheriffs in Louisiana except sheriffs of Avoyelles, Livingston, St. James, and Lafayette Parishes and the Civil Sheriff in Orleans, namely (name of Parish in parenthesis): Charles C. Foti, Jr. (Orleans), Kenneth Goss (Acadia), Hal Turner (Allen), Jeff Wiley (Ascension), M. Bolivar Bishop (Beauregard), Larry C. Deen (Bossier), James R. Savoie (Cameron), Ronnie Book (Catahoula Parish), Kenneth L. Valentine (Claiborne), Randy Maxwell (Concordia), Rodney Arbuckle (De Soto), Elmer Litchfield (East Baton Rouge), Mark W. Shumate (East Carroll), Wayne Morein (Evangeline), Steve Pylant (Franklin), Leonard Hataway (Grant), Sidney Hebert (Iberia), Harry Lee (Jefferson), Richard Edwards, Jr. (Jefferson Davis), Craig Webre (Lafourche), Carol Smith (La Salle), Wayne Houck (Lincoln Parish), Larry Cox (Madison), Danny McGrew (Morehouse), Victor Jones (Natchitoches), I. F. Hingle (Plaquemines), Paul Raymond Smith (Pointe Coupee), William Earl Hilton (Rapides), Buddy Hackabay (Red River), Charles McDonald (Richland), Guffey L. Pattison (Sabine), Jack A. Stephens (St. Bernard), Greg Champagne (St. Charles), Ronald Ficklin (St. Helena), Wayne L. Jones (St. John the Baptist), Howard Zerangue (St. Landry), Charles Fuseller (St. Martin), David A. Naquin (St. Mary), Rodney Strain, (St. Tammany), Edward Layrisson (Tangipahoa), Ricky Jones (Tensas), Jerry J. Larpenter (Terrebonne), Bob Buckley (Union), Ray

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PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review two identical opinions of the United States Court of Appeals for the Fifth Circuit entered in these consolidated cases on January 10, 2003.

OPINIONS BELOW

The two identical opinions by the United States Court of Appeals for the Fifth Circuit are reported at 318 F.3d 644 (5th Cir. 2003) (No. 01-31408 and No. 01-31410). As the two opinions are identical and cover both consolidated appeals, one copy is in the Appendix, pp. 1-37. The United States District Court for the Eastern District of Louisiana entered three orders: "Order and Reasons" on October 29, 2001, a copy of which is in the Appendix, pp. 38-55; "Order and Reasons" on November 14, 2001, a copy of which is in the Appendix, pp. 56-57; "Judgment" on February 22, 2002, a copy of which is in the Appendix, p. 58.

STATEMENT OF JURISDICTION

The judgments of the United States Court of Appeals for the Fifth Circuit were entered on January 10, 2003. The jurisdiction of this court rests on 28 U.S.C. § 1254(1). The provisions of 28 U.S.C. § 2403(b) may apply. The notification required by Rule 29.4(c) has been made. The Governor of Louisiana was a defendant. The Louisiana Attorney General was served and appeared. The Louisiana Governor was voluntarily dismissed without prejudice. The Louisiana Attorney General is being served with this petition as shown on the Certificate of Service.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

These consolidated cases involve the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution and La. Rev. Stat. Ann. § 33:1432 (2002) (App. 62-64), La. Rev. Stat. Ann. § 33:1520 (2002) (App. 65-66), and La. Rev. Stat. Ann. § 13:1381 (2002) (App. 59-61). The Louisiana statutes are in the Appendix because they are voluminous.

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Eighth Amendment

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment (Section 1)

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of

life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Our Nation's history, legal tradition, and practice is to provide access to all court processes prior to conviction without advance payment of costs. A clerk of court in Orleans Parish and sheriffs statewide in Louisiana demand court costs for filing bond, serving notice, and release on bail from arrestees prior to conviction as a condition precedent to pretrial release on bail. Plaintiffs are arrestees who comprise three classes certified under Fed. R. Civ. P. 23(b)(2). Each class consists of individuals arrested within one year of filing suit. Defendants are the clerk of criminal court in Orleans Parish, the criminal sheriff in Orleans Parish, and all remaining sheriffs in Louisiana except four.[1] Each class involves a separate court cost statute. The "Orleans Clerk" statute[2] has been the general court cost statute for the clerk of criminal court in Orleans Parish since 1880.[3] There are twenty-six numbered items for which the clerk may charge. (App. 59-61). Most of the twenty-six charges are for "filing" or "issuing" something such as a notice or subpoena. Item three is a $5.00 charge "for filing and processing of

[1] The sheriffs of the Parishes of Avoyelles, Livingston, St. James, and Lafayette were not sued.

[2] La. Rev. Stat. Ann. § 13:1381 (2002) (App. 59-61).

[3] See Louisiana Acts 1880, No. 136, § 9. The amounts have gone up through the years.

appearance or witness bond." Arrestees in Orleans Parish are not allowed pretrial release on bail until the clerk is paid this $5.00 charge. The $5.00 charge is retained by the clerk regardless of whether charges are dismissed or there is a conviction. The statute says "charges *may* be made for the services of the clerk." There are no guidelines or procedures in the statute for exercising discretion on when to charge.

The "Orleans Sheriff" statute[4] has been the court cost statute for the sheriff in Orleans Parish since 1880.[5] There are ten numbered items for which the Orleans sheriff may charge. (App. 65-66). Five of the ten charges are for "serving" something such as a notice or subpoena. Item three is a charge "for serving notice of arraignment or of trial on accused and surety, for each, and return, seven dollars." Arrestees in Orleans Parish are not allowed pretrial release on bail until the sheriff is paid $14.00 for service of two notices. No notices are issued in many cases such as the case of the class representative, Demico Perkins. Charges are frequently dropped in screening by the district attorney before arraignment or trial. Notice of arraignment or trial is typically made part of the bail bond and requires no issuance or service by the sheriff.[6] Item six in the Orleans Sheriff statute is a $15.00 charge "for taking appearance bond or recognizance bond." (App. 65). Arrestees in Orleans Parish are not allowed release on bail pretrial until the sheriff is paid a multiple of $15.00 based on the number of bookings for accepting bond. There is a

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[4] La. Rev. Stat. Ann. § 33:1520 (2002) (App. 65-66).

[5] See Louisiana Acts 1880, No. 136, § 30.

[6] See La. Code Crim. Proc. Ann. Art. 344 (2002).

provision in the statute that says the $15.00 charge can be "suspended," but there is no evidence that the charge has ever been suspended or refunded where there is no conviction.

The "Multi-Sheriff" statute[7] has been the court cost statute for all sheriffs except the sheriff of Orleans Parish[8] since 1920.[9] The sheriffs' charges were located in a number of statutes before 1920 going back to 1870.[10] There are nine numbered items for which the sheriffs may charge. (App. 62-64). There are charges for feeding prisoners, executing prisoners, and mileage for transporting prisoners. Item nine in the Multi-Sheriff statute is a $15.00 charge "for taking appearance bond." Arrestees in parishes other than Orleans are not allowed pretrial release on bail until a sheriff is paid $15.00 or a multiple of $15.00 based on the number of bookings for accepting bond. Some sheriffs charge a flat rate of $15.00; others charge a multiple of $15.00. Some sheriffs will accept a promise to pay.[11] Four sheriffs have never collected the charge prior to conviction.[12] Like the Orleans-Sheriff statute, there is a provision in the statute that says the $15.00 charge can be "suspended." Unlike the Orleans-Sheriff statute, there is a

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[7] La. Rev. Stat. Ann. § 33:1432 (2002) (App. 62-64).

[8] It is common for Orleans Parish (New Orleans) to have a separate statute from the rest of the State.

[9] The current form of the statute was enacted by Louisiana Acts 1920, No. 208, § 1.

[10] See La. Rev. Stat. 1870 § 652, 765 to 768, 1024, 1035, 1512, 2844 to 2846, 3555, 3564 to 3566, 3568, 3572, 3573, 3899.

[11] Sheriffs of Acadia, Allen, Jefferson, Natchitoches, Richland, and St. Landry Parishes.

[12] Sheriffs of Avoyelles, Livingston, St. James, Lafayette Parishes.

provision in the Multi-Sheriff statute that says: "A judge of a district court of the parish shall waive this fee if a defendant has been tried and found not guilty or if the charges against the defendant are dismissed." The sheriffs admit their usual practice is to keep the charge without regard to whether there is a conviction. According to the evidence, out of the perhaps hundreds of thousands of fees that have been paid to the fifty-eight sheriffs under the Multi-Sheriff statute, only three sheriffs claim they have ever seen a "waiver" or refund (St. Martin Parish – 1, Vernon – 37, Washington – 3).[13] There is no procedure for suspension or waiver in the statute.

Class representative Perkins is a typical plaintiff. Before being released on bail, Perkins paid the Orleans Clerk $5.00 for filing his bond, the Orleans Sheriff $15.00 for one booking and $14.00 for two notices. (App. 108-109.) The charges against Perkins were dismissed. No notices were issued by the sheriff. Perkins did not get any of his costs back from the clerk of court or sheriff. There is no procedure for a refund.

Upon conviction, a defendant is automatically liable for all court costs under the Orleans Clerk statute, Orleans Sheriff statute, and Multi-Sheriff statute, whether or not costs are assessed by the court.[14] A judge would have to affirmatively suspend payment of costs at sentencing to remove liability for costs after conviction. Court costs are inherent in the adjudication of guilt in Louisiana.

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[13] Sheriff of Cameron Parish tendered all fees into the registry of the district court pending the outcome of this case.

[14] La. Code Crim. Proc. Ann. Art. 887 (2002).

Petitioners are challenging whether court costs can be demanded prior to conviction and whether pretrial release on bail can be withheld to collect court costs to a clerk of court or sheriff. Plaintiffs in all three classes sought to enjoin the clerk of court and sheriffs from demanding court costs before release from jail and restitution of monies paid. Petitioners filed three complaints in the district court which were consolidated with another pending case involving the Orleans Sheriff.[15] The grounds for jurisdiction in the district court are that these actions arise under the Fourth, Eighth and Fourteenth Amendments, and the provisions of 42 USCA § 1983. Jurisdiction was invoked pursuant to 28 USCA § 1331, § 1343, § 1983, § 2201, and § 2202. Defendants in the Multi-Sheriff class and Orleans Clerk class either filed or adopted a motion to dismiss. The Orleans Sheriff did not file or adopt a motion to dismiss or motion for summary judgment or for judgment on the pleadings. Trial on the merits of the permanent injunction was advanced and consolidated with the hearing on the application for preliminary injunction and hearing on defendants' motions to dismiss. All issues of damages were bifurcated to be tried separately from liability issues. The motions to dismiss were treated as summary judgment because stipulated evidence was admitted. The district court dismissed all plaintiffs' claims against all defendants finding no cause of action. The Fifth Circuit affirmed. Petitioners timely file this writ application seeking reversal of the dismissal of all three cases.

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[15] The original case involving the Orleans Sheriff has been resolved and is not relevant herein.

WRIT GRANT CONSIDERATIONS UNDER RULE 10

The Fifth Circuit misstated the rule of a United States Supreme Court case. The Fifth Circuit decision allowing a sheriff to demand a fee for release on bail under a Louisiana statute conflicts with a Louisiana Supreme Court decision on that statute. The *per se* questions whether court costs can be collected prior to conviction and whether there is a "limited" implied fundamental right to release on bail under the Eighth Amendment after one is found eligible for bail and posts bail are important issues which have not been but should be settled by the Supreme Court.

STANDARD OF REVIEW

The standard of review of a lower court's findings of law and summary judgment is *de novo*. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

ARGUMENT

I. Is it constitutional for sheriffs and a clerk of court to collect court costs prior to conviction?

In the late 1800's and early 1900's, the supreme courts in at least three states refused to allow the imposition of court costs on a non-convicted defendant. *State v. Brooks*, 7 P. 591, 595-596 (1885), citing "principles embodied in the constitutional bill of rights," held a defendant should not have to pay costs relating to three charges on which he was acquitted, "but should have recovered costs." *Childers v. Commonwealth*, 198 S.E. 487, 489 (1938), stated the

defendant "should not be made to pay costs of a prosecution, which, so far as he is concerned, should never have been instituted." See also *Biester v. State*, 91 N.W. 416 (1902).

Giaccio v. State of Pennsylvania, 382 U.S. 399 (1966), held that a state statute which allowed a jury to assess costs against acquitted defendants violated the Fourteenth Amendment's Due Process Clause. The majority of the court avoided ruling on the general question of whether assessment of costs against an acquitted defendant is *per se* unconstitutional by holding the challenged statute unconstitutionally vague. The concurring opinions were less reticent, holding that allowing the assessment of costs against an acquitted defendant "violates the most rudimentary concept of due process of law." *Id.*, 405 (Stewart, J.) (concurring opinion).

It is supposed to be trial and conviction first, then punishment. Otherwise, the presumption of innocence would not mean much. "Punishment for any crime before trial and proper conviction is alien to our legal system and constitutes a denial of due process." *Hunt v. Roth*, 648 F.2d 1148, 1162-1163 (8th Cir. 1981) (vacated as moot sub nom), *Murphy v. Hunt*, 455 U.S. 478 (1982). Where punishment is imposed before conviction, "the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Ingraham v. Wright*, 430 U.S. 671, 672 n.40 (1977). Under medieval law, the accused had to prove innocence by touching hot irons or boiling stones without getting scars on the hands. In the 19th Century, the jury trial developed in Europe and the burden of proof shifted from the accused having to prove innocence to the accuser having to prove guilt. The change

> reflected a consensus that a number of fundamental interests and rights required that the burdens of production and persuasion be shifted to the state. In allocating burdens, courts and commentators repeatedly affirmed that an individual's liberty interest was valued over society's interest in obtaining a conviction. *The Rhetoric of Innocence*, 70 WASH. L. REV. 329, 332-333 (1995).

An individual's liberty interest is valued so much over society's interest in obtaining a conviction that "it is far worse to convict an innocent man than to let a guilty man go free." *In Re Winship*, 397 U.S. 358, 372 (1970). That principle of justice goes back to the 19th Century with Jeremy Bentham, the 18th Century with Blackstone, and the 17th Century with Matthew Hale. 70 WASH. L. REV. 333 n.17. If an individual's liberty interest is important enough to let a guilty man go free, should such a liberty interest be subordinated to the interest of sheriffs and a clerk of court raising revenue? The presumption of innocence in America is "that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of our criminal law." *In Re Winship*, at 363. The sheriffs and a clerk of court charging presumed innocent arrestees for pretrial liberty has the same effect as a penalty or fine. Any fine on an innocent man is *per se* an Excessive Fine prohibited by the Eighth Amendment. *Augustus v. Roemer*, 771 F. Supp. 1458 (E.D. La. 1991). Although the Supreme Court has never directly applied the Excessive Fines

Clause of the Eighth Amendment to the states, scholars and at least one Justice have suggested it applies.[16]

Giaccio, supra, held a statute was "invalid under the Due Process Clause because of vagueness and the absence of any standards sufficient to enable defendants to protect themselves against arbitrary and discriminatory impositions of costs." *Id.*, at 402. The Orleans Clerk statute states the charges by the clerk "*may* be made." (See App. 59). The statute has no standards to determine when the charge should or should not be made by the clerk, even for indigents. The Orleans Sheriff statute has no procedures whereby a person acquitted can seek the return of the fee. (See App. 65-66). The Multi-Sheriff statute mandates a waiver where charges are dropped or there is an acquittal, but no procedure is created. (See App. 62-64). Some of the sheriffs put "Booking fee nonrefundable" on their receipt form. No procedures or standards for suspension are stated in any of the statutes. All three statutes are unconstitutionally vague and ambiguous as regards collecting costs before conviction. There is nothing in the statutes that protects arrestees against arbitrary and discriminatory impositions of court costs prior to conviction and as a pre-condition to release on bail.

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[16] RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, §15.6, at 622 (1999) (arguing for the incorporation of this clause "because it is intertwined with the other two clauses of the Eighth Amendment and the Supreme Court has already regulated the imposition of fines on indigents through the equal protection clause of the Fourteenth Amendment."). See: *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J. concurring in part, dissenting in part) (urging the "excessive fines" clause should apply to the states).

II. Is there a "limited" fundamental right to release from jail after one is found eligible for bail and posts bail? If so, does the amount really matter when charging for mere access to a fundamental right? The poll tax was only $1.50.

Strict judicial scrutiny applies to state statutes which interfere with the exercise of a fundamental right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). Arrestees are not a suspect class. The issue is whether there is a "limited" fundamental right to release on bail for arrestees who are bail eligible. The Supreme Court has never had to resolve this question. It has been suggested that the reason is because there have been statutory guidelines for bail in existence longer than the presence of the "excessive bail" clause in the Constitution. See Duker, *Right to Bail: A Historical Inquiry*, 42 ALB. L. REV. 33 (1977). The Eighth Amendment is applicable to the states through the Fourteenth Amendment. See *Robinson v. State of California*, 370 U.S. 677 (1962). The question is not whether every arrestee has a fundamental right to pretrial release on bail. They do not. The question is whether the prohibition against "excessive bail" in the Eighth Amendment implies a "limited" fundamental right to bail. The Supreme Court has recognized implied constitutional rights. For example, *Dunn v. Blumstein*, 405 U.S. 330 (1972), recognized freedom to travel throughout the United States as a fundamental right. See also: *Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961). Regarding bail, *Stack v. Boyle*, 342 U.S. 1, 4 (1951), citing the Eighth Amendment, stated "this traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this

right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning." (Citations omitted). The Court recognized that "the function of bail is limited; the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant." *Id.* at 5.

The lower courts and commentators have found support for a "limited" fundamental right to bail. *Hunt v. Roth*, 648 F.2d 1148, 1157 (8th Cir. 1981) (vacated as moot sub nom), *Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam), stated: "If the Eighth Amendment has any meaning beyond sheer rhetoric, the constitutional prohibition against excessive bail necessarily implies that unreasonable denial of bail is likewise prohibited. Logic defies any other resolution of the question." *United States v. Fah Chung*, 132 F. 109, 110 (D.C. Ga. 1904), stated that if "it be unlawful under our system to deprive any person of his liberty by fixing excessive bail, which he cannot give, a fortiori would it seem also unlawful to deprive him of his liberty by refusing bail altogether." Regarding the due process right of access, see J. NOWAK, R. ROTUNDA, J. YOUNG, CONSTITUTIONAL LAW (5th Ed. West 1995), § 11.7 at p. 403 and n.28. *Augustus v. Roemer, supra*, 1464, which held unconstitutional a $20 charge on recognizance bonds and a 2% bail fee that benefitted only government officials, is the only case which has ever squarely held "there is a limited fundamental right to bail."

> Once eligibility for pretrial release has been determined, the defendant has a substantive due process right to access the bail system. This implied right is fundamental because it would be unfair to deprive a defendant of access to a

> procedure for which he has already been determined to be eligible, especially where access to the procedure has a direct impact on his important liberty interests. *Id.*, at 1467.

The Fifth Circuit in the instant case criticized and declined to follow *Augustus* based on its misreading of *Schilb v. Kuebel*, 404 U.S. 357 (1971). The Fifth Circuit misstated the three-factor test in *Schilb*. This is the second time the Fifth Circuit has misconstrued *Schilb*. See *Enlow v. Tishomingo County, Mississippi*, 45 F.3d 885 (5th Cir. 1995). The lower courts in this case reasoned that a 1% fee for a bail bond issued by the courts (as opposed to by bondsmen for a 10% fee) in *Schilb* did not impinge on the exercise of a fundamental right, so the rational basis test applies to whether court costs charged by the sheriffs and clerk are constitutional. The Fifth Circuit declined to enjoin the charges prior to conviction even though there is no "compelling purpose" (378 F.3d at 651) and "the sheriffs' reasons for charging these fees are relatively weak." *Id.* at 663. But, the money is charged for something far, far different in *Schilb*. It has to be for something far different. Otherwise, why would the *Schilb* Court call the fee in that case constitutional and the Louisiana Supreme Court call the sheriffs' charge "extortion"? See *State ex rel. Leche v. Waggner*, 8 So. 209 (La. 1890). So, what is the difference between the voluntary 1% fee for a bail bond upheld in *Schilb* and the mandatory court costs charged by the sheriffs and clerk in this case? In order to understand the difference, it is helpful to understand what was going on around the Nation starting in the 1960's with a movement to reform the professional bail bondsman system.

We begin with *Schilb* in Illinois.

> Prior to 1964 the professional bail bondsman system with all its abuses was in full and odorous bloom in Illinois. Under that system the bail bondsman customarily collected the maximum fee (10% of the amount of the bond) permitted by statute . . . and retained that entire amount even though the accused fully satisfied the conditions of the bond. . . . Payment of this substantial "premium" was required of the good risk as well as of the bad. The results were that a heavy and irretrievable burden fell upon the accused, to the excellent profit of the bondsman, and that professional bondsmen, and not the courts, exercised significant control over the actual workings of the bail system. *Schilb* 359-60.

Illinois enacted a statute to reduce the cost of release on bail. For an arrestee with a $100,000.00 bail, the cost of his bail bond would be 10% ($10,000) through a bondsman or 1% ($1,000) through the optional court run plan. Or, the arrestee could opt to secure a bail bond by depositing the full amount of the bail in cash, stocks and bonds, or real estate without paying any fee whatsoever. Observing that the intention of the reform statute was to reduce the cost of liberty to arrestees awaiting trial, the Supreme Court stated: "There is nothing in the statute which is intended to work any additional hardship on anyone in the giving of bail." *Id.*, 363 n.8. That is why the 1% fee did not impinge upon a fundamental right. The Illinois statute created a voluntary option, was intended to reform the bail system, and conferred a benefit on arrestees by saving them 90% of the cost of a bail bond in exchange for a fee.

Illinois was not the only state to enact bail reform legislation. Pennsylvania offered the choice to participate

in a county sponsored bail program that would reduce the standard 10% bond premium to a commercial bondsman to a 2% or 3% fee to the county. See *Buckland v. Montgomery County of the Com. of Pa.*, 812 F.2d 146 (3rd Cir. 1987). By 1990 there were a number of bail reform statutes like the ones in Illinois and Pennsylvania. In Alaska (Alaska C.Cr.P. 12.30.020) and Iowa (Iowa Code 36:811.2), if an arrestee chose to deposit 10% of the amount of bail with the court, the full 10% was returned without retaining a fee. Kentucky (Ky. Rev. Stat. 40:431.530) offered an option for a 10% deposit with the court where 1% was retained as a fee if there was a conviction and nothing was retained if there was no conviction. Oregon (Or. R. S. 14:135.265) offered a plan with a 10% deposit and 1.5% retention and Florida (Fl. Cr. Pr. 47:903.105) offered a 10% deposit with a 2.5% retention.

The bail reform statutes in Illinois, Pennsylvania, Alaska, Iowa, Kentucky, Oregon, and Florida all have the three *Schilb* factors. The statutes:

1) create a voluntary option;

2) are intended to reform the bail system; and

3) confer a benefit on arrestees in return for a fee without working any additional hardship in the giving of bail.

By 1990, seven states had instituted a voluntary system that facilitated liberty before trial by reducing the cost of bail from 10% to a range of 0% to 3%. The bail reform statutes create a classic "win/win" situation. Government gets revenue that used to go to bondsmen. Presumed innocent arrestees have the option of not paying an exorbitant amount of money to a bondsman to exercise their right to pretrial release on bail. The courts, instead of

bondsmen, control bail. The bail reform movement, with the most honorable of intentions which occurred in Illinois in the 1960's and then in six other states, was transmogrified in statutes in Mississippi and Louisiana in the 1990's. Mississippi enacted a 2% surcharge on bail bonds in addition to its traditional 10% commercial bond fee. See *Enlow v. Tishomingo, supra.* Like Mississippi, Louisiana enacted statutory plans that increased the traditional 10% cost to 12% for the sole purpose of raising revenue for government without providing any benefit whatsoever to arrestees. For example, in a recent Louisiana Supreme Court case "the record shows that the $100,000 bond cost $12,000 to secure." *State v. Lopes*, 805 So.2d 124, 129 fn 1 (La. 2001). The $12,000 is in addition to the charges at issue in this litigation. The current bail fee scheme in Louisiana is contained in Title 22 entitled "Insurance". La. Rev. Stat. Ann. § 22:1404.3 (2002) sets the premium on commercial bonds at 12%. Louisiana's current 2% bail fee law, La. Rev. Stat. Ann. § 22:1065.1 (2002), imposes a 2% fee on bondsmen. The 2% fee is distributed as follows: 25% to judicial court fund; 25% to sheriff's general fund; 25% to district attorney's operating fund; and 25% to Indigent Defender's Program.[17] In Louisiana, the coffers of the judges, district attorneys, sheriffs, and even the indigent defenders, all benefit by high bail amounts. The above statutory scheme, which increases the cost of a commercial bail bond in Louisiana from the traditional 10% to 12% in addition to the charges at issue in this litigation, was

[17] In Orleans Parish, the distribution is: 40% judicial expense fund; 20% criminal sheriff's operating fund; 20% district attorney's operating fund; 20% indigent defender's program. La. Rev. Stat. Ann. § 13:1381.5 (2002).

enacted by the Louisiana Legislature in response to *Augustus, supra*, which permanently enjoined three Louisiana statutes which had increased the cost of bail bonds to 12% and charged $20.00 for recognizance bonds.

There are three important differences between the 1% fee in *Schilb* and the sheriff and clerk charges in the present case. The fee in *Schilb* was voluntary. The sheriff and clerk charges are mandatory. Arrestees either pay or forgo their right to release on bail. There was a proper statutory purpose (reform) narrowly tailored in *Schilb*. The only purpose of the sheriff and clerk charges is to raise money. *Schilb* conferred a benefit in return for a fee without working any additional hardship in the giving of bail. The sheriff and clerk charges confer a benefit only on the sheriff and clerk and increase the cost of bail.

A long line of Supreme Court cases establishes that government officials cannot place a burden on or charge for mere access to a fundamental constitutional right. *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), struck down a Virginia law that required voters to pay a $1.50 poll tax as a condition for exercising their right to vote in state elections. See also: *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Procunier v. Martinez*, 416 U.S. 396 (1974); *Gardner v. Broderick*, 392 U.S. 273 (1968). The rule is clear. A state statute may not authorize a monetary charge or burden on the exercise of a fundamental right without a compelling state interest. Raising revenue for government services is not a compelling interest. The lower courts misconstrued the three *Schilb* factors. The lower courts erred by equating money required for security with money for court costs. The lower courts erred by equating the choice to obtain pretrial release on bail with the choice in *Schilb* to pay a 1% fee to government instead

of a 10% fee to a bondsman. The lower courts erred by equating the benefit of a 90% reduction in the cost of bail with the benefit of obtaining pretrial release on bail. That is like saying the $1.50 poll tax was voluntary because one only had to pay if one chose to vote or the $1.50 conferred a benefit on a citizen because he got to participate in an election. The only beneficiaries of the sheriffs' and clerk's charges are the sheriffs and clerk.

Petitioner Perkins paid $5.00 to the Orleans Clerk, $15.00 to the Orleans Sheriff for one booking plus $14.00 to the sheriff for notices. (App. 108-109). Like many, if not most plaintiffs, all charges against Perkins were dismissed. The Fifth Circuit decision called the amount paid by petitioners "nominal" (378 F.3d at 651), "de minimis" (*Id.*), "small" (*Id.*, at 661), "without constitutional significance" (*Id.*, at 657), and "danum absque injuria." (*Id.*). No authority was cited to support a connection between the amount charged and constitutionality of the charge. *Harper*, *supra*, struck down a $1.50 poll tax. *Waggner*, *supra*, removed a sheriff from office for demanding $1.00 (or the promise to pay $1.00) to release an arrestee on bail. If Petitioner Perkins held the sheriff in custody and demanded money for his release, it would be called kidnapping or extortion whether the demand for release was $29.00 or $29,000,000.00. *Lockyer v. Andrade*, 538 U.S. ___ (2003) (No. 01-1127), affirmed two consecutive terms of 25 years to life where the "third strike" was for stealing $84.70 and $68.84 worth of videotapes. A recent district court case struck down a statute on procedural due process grounds that imposed a flat $30.00 book-in fee to cover the administrative costs of confinement of pretrial detainees. *Allen v. Leis*, 213 F. Supp. 2d 819, 831-34 (S.D. Ohio 2002). *Stack v. Boyle*, *supra*, stated:

> "Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment." *Id.*, at 5.

How are the sheriffs' and clerk's charges reasonably calculated to fulfill the purpose of bail? The legal question should be what is the charge for, not how much is the charge. The 1% charge in *Schilb* was for a bilaterally voluntary program that reduced the cost of a bail bond by 90%. Illinois can stop the program any time and arrestees can use a commercial bondsman and avoid the 1% fee to government for a bail bond. The sheriffs and clerk are collecting a mandatory charge for release from jail and for serving notices. Doesn't due process obligate the sheriffs and the clerk to release arrestees from jail and serve notices? Can they charge presumed innocent arrestees for due process? Who owns due process?

The lower courts also erred by not enjoining the charges as a violation of equal protection. "Where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized." *Harper,* at 670. It would be difficult to characterize the way the statutes in this case are implemented statewide other than as arbitrary. Here is a summary of the undisputed stipulated evidence. (See App. 81-107). The clerk in Orleans charges $5.00 per arrestee, but no other clerk in Louisiana charges prior to conviction. Many sheriffs charge $15.00 per arrestee. Some sheriffs charge $15.00 per booking. Only

the Orleans Sheriff adds $14.00 for notices. Four sheriffs never charge prior to conviction. The charge has never been waived by most sheriffs. The judges in Calcasieu Parish claim to waive the charge for health reasons. The judges in Lafourche claim to waive the charge on recognizance bonds, but not on cash, property, or commercial bonds. There is no mandatory waiver for indigents. Most sheriffs will not accept a promise to pay. Four sheriffs sometimes accept a promise to pay. There is no compelling state interest that justifies these classifications. There isn't even a rational basis for the classifications. They are arbitrary. The lower courts erred by reasoning that there was no equal protection violation in *Buckland v. Montgomery County of the Com. of Pa.*, 812 F.2d 146 (3rd Cir. 1987), so there is no equal protection violation in the instant case. *Buckland* involved a Pennsylvania bail reform statute allowing a 2% to 3% fee on bail bonds. The fee varied in that range from county to county. But, the statute in *Buckland* met all three *Schilb* factors: a voluntary option; intended to reform the bail system without working any additional hardship in the giving of bail; which benefits arrestees by reducing the cost of release on bail 70% to 80%. "The plan in *Schilb* differs from Pa.R.Crim.P. 4015(b) only in that the Illinois legislature provided for a one percent fee and the Pennsylvania rule allows each county to set a 'reasonable' fee." *Buckland*, at 149. Because there is facilitation, not impairment, of a fundamental right, the counties in Pennsylvania only had to show a rational basis for the difference in their charges. Strict scrutiny should be applied to this case because demanding court costs before release on bail burdens, without benefit, access to bail. The sole purpose of the policy is to raise money for sheriffs and a clerk with

callous indifference to the fundamental liberty interests of presumed innocent arrestees.

The lower courts further erred by not enjoining the charges as a violation of the Fourth Amendment. At the time the money is collected, the arrestees are presumed innocent and there is no way of knowing whether there will be a conviction. The sheriffs and clerk are doing exactly what the sheriff was doing in *Waggner, supra*, that the Louisiana Supreme Court called "extortionate." Once plaintiffs were determined to be eligible for release on bail and posted the amount of bail set, detaining the plaintiffs until they paid or promised to pay money was an unreasonable seizure of their person, like false imprisonment. Forcing the plaintiffs to pay or promise to pay money to be released from jail was an unreasonable seizure of their money.

The City of New Orleans was sued for restitution in the event liability is established against the Orleans Clerk. The district court, having dismissed plaintiffs' case against the clerk, granted the City of New Orleans' 12(b)(6) motion to dismiss. The City of New Orleans would be liable for any judgment rendered against the clerk. If this Court finds liability against the Orleans Clerk, then the dismissal of the City should be addressed on remand.

III. Can the federal courts ignore the Louisiana Supreme Court's interpretation of a Louisiana court cost statute because the decision is old?

The federal judiciary does not have the authority to place a construction on a state statute different from one rendered by the highest court of the State. The supreme court of a state is truly the highest court in terms of

interpreting its state law, and it is not a "lower court," even in relation to the Supreme Court of the United States. *Johnson v. Fankell,* 520 U.S. 911 (1997). *Waggner, supra*, viewed the sheriff's fee for taking bond as a court cost and removed a sheriff from office for demanding $1 to release arrestees on bail. The Fifth Circuit only mentioned *Waggner* in a footnote (318 F.3d at 660, n.89). The Fifth Circuit acknowledged the statute in *Waggner* is "almost identical to the Orleans Clerk statute." Actually, the statute in *Waggner* is almost identical to the Orleans Sheriff and Multi-Sheriff statutes.[18] The Fifth Circuit declined to follow *Waggner* because it is "ancient," "failed to articulate the basis on which it found this statute offensive," and "Schilb and Bell[19] have been decided subsequently by the United States Supreme Court, and quite clearly characterize such charges as administrative fees . . . ". *Waggner*, decided in 1890, is ancient, but so is Louisiana and its civil law. All three statutes in this case date back to the 1800's. The Louisiana Supreme Court recently confirmed that it still considers its 1850's decisions interpreting court costs statutes involved in this litigation good authority. *State v. Lopes*, 805 So.2d 124, 129 (La. 2001), interpreted La. Code Crim. Proc. Art. 887 (2002) (which goes back to at least 1855; See Louisiana Acts 1855, No. 121, § 3.), citing *Parker v. Robertson*, 14 La. Ann. 249 (1859). *Waggner* articulated at least two grounds for its interpretation of Louisiana's court cost scheme. First, the Louisiana Supreme Court recognized that the statutory provision allowing a fee for the sheriff for taking

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[18] Louisiana Acts 1870, No. 101 (App. 67-80).

[19] Referring to *Bell v. Wolfish*, 441 U.S. 520 (1979).

bond is not a separate statute. It is an item in a lengthy statute containing a long list of items for which the sheriff can charge a fee. All items in the list are phrased in the active tense, e.g., for "taking," "issuing," "serving," "filing." The Louisiana Supreme Court reasoned that if the court cost statutes were interpreted to mean that a sheriff could charge $1.00 for taking bond at the time of release on bail, then sheriffs could withhold all services until the charge for each service is paid. That concern is just as valid today as it was when *Waggner* was decided. The verbs in all three court costs statutes are still in active tense.

> If the sheriff may demand and receive one dollar for the taking of bailbonds, what reason is there to say he shall not demand and receive all other fees in the same way, and at the same time, for the law says he is entitled to demand and receive the following fees of office? *Waggner*, 8 So. at 211.

Waggner interpreted the sheriffs' court cost statute under Louisiana's court cost scheme to disallow sheriffs from collecting a release fee prior to conviction. The second basis for *Waggner* may not be genteel, but it is articulated. The Louisiana Supreme Court viewed the practice of a sheriff withholding pretrial release from jail on bail until $1.00 or a promise to pay $1.00 was given as "extortion." *Id.*, at 211. The Fifth Circuit's reasoning that *Schilb* was decided after *Waggner* and somehow overrules *Waggner* is misguided. Obviously, Louisiana's court cost statutes that go back to the 1800's are not bail reform legislation like Illinois' in *Schilb*. *Schilb* did not interpret Louisiana law. *Schilb* decided whether Illinois could create a 1% government charge for a bond under a bail reform program that cut the cost of bail by 90%. The fact that Illinois has the constitutional authority to charge a 1% fee for a bond

under a voluntary bail reform program does not preclude the Louisiana Supreme Court from interpreting Louisiana's court cost laws to disallow sheriffs from collecting their fees prior to conviction. *Schilb* did not interpret Louisiana law.

Because the Orleans Sheriff and Multi-Sheriff statutes are identical in all relevant ways to the statute in *Waggner*, the sheriffs do not have the authority to collect a release fee prior to conviction. In addition to *Waggner*'s interpretation of the sheriffs' authority, the plain wording of the three statutes does not contemplate collecting the fees prior to conviction. La. Code Crim. Proc. Art. 887 (2002) prohibits the imposition of costs before conviction. If the statutes authorize the collection of costs before conviction, then the statutes are unconstitutional on their face under the concurring opinion in *Giaccio*, *supra*, because it is *per se* unconstitutional to collect court costs without a conviction. Both as a matter of Louisiana Supreme Court precedent and federal constitutional law, the sheriffs lack the authority to withhold release on bail until costs are paid. Since sheriffs do not have authority to charge court costs as a precondition to release on bail, the sheriffs and clerk are violating due process by acting outside of their authority.

> "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of state law." *U.S. v. Classic*, 313 U.S. 299, 326 (1941).
>
> Acts of officers who undertake to perform their official duties are included whether they hew the line of their authority or overstep it." *Screws v. U.S.*, 325 U.S. 91, 111 (1945).

Not only do the sheriffs and clerk exceed their authority by collecting the fees prior to conviction, but the sheriffs under the Multi-Sheriff statute exceed their authority by failing to refund the money to non-convicted arrestees. La. Rev. Stat. Ann. § 33:1432 has a mandatory waiver provision if a defendant is not convicted, as follows:

> A judge of a district court of the parish shall waive this fee if a defendant has been tried and found not guilty or if the charges against the defendant are dismissed.

The restitution issue was bifurcated from the liability issue. If the lower courts are reversed on the liability issue, petitioners have alleged and expect to prove on the restitution issue that the majority of plaintiffs who paid a $15.00 (or multiple thereof) release fee were not convicted of anything. The conviction rate is much lower in state court in Louisiana than it is in federal courts. The Fifth Circuit erred by reasoning that the sheriffs do not exceed their authority by failing to return the money they are holding from non-convicted arrestees because *Schilb* does not require the return of the money if there is no conviction. There was no statute in *Schilb* that mandated the fee be waived if there was no conviction. Where a statute mandates waiver, the sheriffs violate due process when their official policy is to exceed their statutory authority by keeping the money.

The Fifth Circuit erred in its application of the "probable value, if any, of additional procedural safeguards" prong of the test in *Matthews v. Eldridge*, 424 U.S. 319, 343 (1976), to the refund issue. The Fifth Circuit reasoned that a refund process "could ultimately reduce funding of the bail bond system by increasing administrative costs and decreasing government revenue from such

fees, because more acquitted arrestees are likely to obtain refunds." (378 F.3d at 656). If the purpose of the fee is to raise money, obviously refunding money or having a process for refunding money diminishes the goal of raising money. But the Louisiana Supreme Court's interpretation of when sheriffs can collect fees and *Giaccio*'s preclusion of collecting court costs where there is no conviction are supposed to constrain the sheriffs' policies in collecting fees without regard to the net effect on fund-raising. Of course, no refund policy is necessary if the sheriffs collect their fees after conviction, except for the small percentage of cases that are reversed on appeal.

Constitutional problems arise when state legislation tries to turn judges, clerks of court, or sheriffs into revenue raisers for their offices. Sheriffs have broad discretion to determine whether to arrest or issue a summons and the number of bookings for an arrestee who is arrested by a sheriff's deputy as evidenced by the sheriffs' stipulations. The typical stipulation by the sheriffs in this case is "Sheriff deputies have discretion over the number of bookings." (See App. 81-107). Some sheriffs charge $15.00 *per booking*. Arrestees have a procedural due process right to an impartial determination of the number of bookings. The question is whether a sheriff "exercises sufficient executive control over the finances and financial policy . . . to make him a potential partisan in order to maintain the level of the particular fund." *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). The $15.00 per booking is exclusively controlled by sheriffs and is collected and kept without regard to conviction, even when all charges are dropped because there is no probable cause. *Ward* and *Tumey v. Ohio*, 273 U.S. 510 (1927) involved mayor/judges, but the reasoning applies to sheriffs determining the

number of bookings. The challenged statutes create a temptation by sheriffs to stack charges by imposing arbitrary and capricious multiple bookings on arrestees to raise revenue for the sheriffs' office.

Petitioners reserve all issues implicit in this petition, it being their intent not to waive any arguments made to the lower courts.

CONCLUSION

It is one thing to whack the guilty with costs upon conviction up to the ceiling allowed under the "Excessive Fines" clause of the Eighth Amendment. It is another thing to soak the innocent to fund Louisiana's obligation under the federal constitution to administer a criminal justice system. The Orleans Clerk of Court and the sheriffs should be enjoined from collecting court costs from innocent arrestees and from demanding payment of costs prior to release from jail on bail. These consolidated cases should be remanded for trial to address restitution of money collected.

PRAYER

WHEREFORE, petitioners pray certiorari be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-31408

KAYNE BROUSSARD, ETC; ET AL.,

Plaintiffs,

versus

THE PARISH OF ORLEANS, ETC; ET AL.,

Defendants.

LEONARD J. DAZET, JR., and all those similarly situated; JAMES ANTHONY McDANIEL, and all those similarly situated,

Plaintiffs-Appellants

versus

M.J. FOSTER, ETC; ET AL,

Defendants

KENNETH GOSS, Sheriff of Acadia Parish; ET AL,

Defendants-Appellees

DEMICO PERKINS, and all those similarly situated,

Plaintiff-Appellant

versus

M.J. FOSTER, ETC; ET AL,

Defendants

CHARLES C. FOTI, JR., Individually and in his official capacity as the Criminal Sheriff of Orleans Parish, State of Louisiana,

Defendant-Appellee

DEMICO PERKINS, and all those similarly situated,

Plaintiff-Appellant

versus

M.J. FOSTER, ETC; ET AL,

Defendants

EDWIN A. LOMBARD, In his official capacity as Clerk of Criminal District for the Parish of Orleans, State of Louisiana, THE CITY OF NEW ORLEANS,

Defendants-Appellees

Cons/W 01-31410

KAYNE BROUSSARD, ETC; ET AL.,

Plaintiffs,

versus

THE PARISH OF ORLEANS, ETC; ET AL.,

Defendants.

DEMICO PERKINS, and all those similarly situated,

Plaintiff-Appellant

versus

M.J. FOSTER, ETC; ET AL,

Defendants

EDWIN A. LOMBARD, In his official capacity as Clerk of Criminal District for the Parish of Orleans, State of Louisiana, CITY OF NEW ORLEANS,

Defendants-Appellees

Appeals from the United States District Court
for the Eastern District of Louisiana

(Filed Jan. 10, 2003)

Before WIENER and STEWART, Circuit Judges, and RESTANI,[1] Judge.

WIENER, Circuit Judge:

In this case, the Plaintiffs-Appellants ("arrestees"), are members of a state-wide group of persons arrested within one year prior to commencement of this suit. They now appeal the district court's rejection of their challenges to three Louisiana statutes, each of which requires payment of a fee as a prerequisite to release on bail. As we find that such fees are administrative charges reasonably related to the functioning of the bail-bond system, we affirm.

I. FACTS AND PROCEEDINGS

Plaintiffs-Appellants comprise three classes of arrestees who challenge three Louisiana statutes ("bail-fee statutes") that impose specified charges or fees when an arrested individual posts bail.[2] Each class is limited to

[1] Judge of the U.S. Court of International Trade, sitting by designation.

[2] The first class consists of arrestees in every Louisiana Parish except Orleans, Avoyelles, Livingston, St. James, and Lafayette. The second class consists of arrestees of Orleans Parish, and the third class consists of arrestees who paid the bail fee to the Clerk of the Criminal District Court of Orleans Parish.

individuals who were arrested within one year of filing suit. The Defendants-Appellees are the sheriffs of almost every Parish in Louisiana (collectively, the "sheriffs"), including the Sheriff of Orleans Parish ("Orleans Sheriff"), and the Clerk of the Criminal District Court for Orleans Parish ("Orleans Clerk").[3]

The following provisions are the challenged portions of the bail-fee statutes:

1. *Section 1432(9)* [hereinafter the "multi-sheriff statute"]:

> The compensation, fees and costs allowed sheriffs, the parish of Orleans excepted, for all services in criminal matters, shall be the following:
>
> 9) For taking appearance bond when required to do so, fifteen dollars, unless suspended by a judge of the district court of the parish. A judge of a district court of the parish shall waive this fee if a defendant has been tried and found not guilty or if the charges against the defendant are dismissed.[4]

2. *Sections 1520(3) and (6)* [hereinafter "Orleans Sheriff statute"]:

> The criminal sheriff of Orleans Parish shall collect from the parties, from witnesses, from sureties, and from sureties on bonds forfeited, the following fees and charges:

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[3] Defendants-Appellees do not include the sheriffs of Avoyelles, Livingston, St. James, or Lafayette Parishes.

[4] La. Rev. Stat. Ann. § 33:1432(9) (2002).

> (3) For serving notice of arraignment or of trial on accused and surety, for each, and return, seven dollars;
>
> (6) For taking appearance bond or recognizance bond when required to do so, fifteen dollars, unless suspended by the judges of the Criminal District Court of the Parish of Orleans.[5]

3. *Section 1381(3)* [hereinafter "Orleans Clerk statute"]:

> The following charges may be made for the services of the clerk of the criminal district court:
>
> (3) For filing and processing of appearance or witness bond, five dollars.[6]

The bail-fee statutes are among a more extensive group of statutes that provides for fees in a variety of situations. For instance, the Orleans Parish sheriff may charge twelve dollars "[f]or serving attachments to bring witnesses into court"[7]; sheriffs of other parishes may charge two dollars "[f]or each warrant executed outside of the parish"[8]; and the Orleans Clerk may charge two dollars "[f]or filing and recording [an] affidavit."[9] Taken together, the entire group reveals that Louisiana has delegated to various parish officials a portion of the responsibility for covering the expenses that they incur while carrying out administrative tasks.

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[5] La. Rev. Stat. Ann. § 33:1520(3), (6) (2002).

[6] La. Rev. Stat. Ann. § 13:1381(3) (1999).

[7] La. Rev. Stat. Ann. § 33:1520(5) (2002).

[8] La. Rev. Stat. Ann. § 33:1432(7) (2002).

[9] La. Rev. Stat. Ann. § 13:1381(1) (1999).

The bail-fee statutes, however, do not constitute the exclusive legislative attempt to collect money through or for the benefit of the bail-bond system. Section 1065.1 of Title 22 of the Louisiana Revised States [sic] imposes a two percent "fee on premium for all commercial surety underwriters who write criminal bail bonds in the state of Louisiana."[10] This fee is distributed to the judicial court fund (25%), the sheriff's general fund (25%), the district attorney's operating fund (25%), and the Indigent Defenders Program (25%).[11] This provision, in fact, was enacted contemporaneously with the repeal of similar but piecemeal legislation,[12] and as a result constitutes "the exclusive fee or tax on any criminal bail-bond premium."[13] Finally, the Louisiana Legislature has provided for the distribution of bond forfeiture amounts from district courts, parish courts, and city courts to some parish sheriffs around the state.[14] In total, sheriffs receive funds to support the bail-bond system from (1) a tax on bondsmen (which the bondsmen likely pass on to arrestees), (2) fees imposed by the bail-fee statutes at issue here, and, for some sheriffs, (3) bond forfeitures.

In the district court, arrestees invoked 42 U.S.C. § 1983 to challenge the constitutionality of the bail-fee statutes under the Fourth, Eighth and Fourteenth

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[10] La. Rev. Stat. Ann. § 22:1065.1(A) (2003).

[11] La. Rev. Stat. Ann. § 22:1065.1(B) (2003).

[12] *See* 1993 La. Acts 834, at 2212; La. Rev. Stat. Ann. §§ 13:994(B), 996(B), and 1384 (1999).

[13] La. Rev. Stat. Ann. § 22:1065.1(A) (2003). There is one exception to the exclusivity of this fee, but it is not relevant here. *Id.*

[14] 1993 Acts, No. 834, at 2206, § 571.11(L).

Amendments, both facially and as applied. As matters outside the pleadings were presented to the district court, it converted the sheriffs' motion for judgment on the pleadings into a motion for summary judgment, then rejected all of arrestees' claims.

On appeal, the crux of arrestees' argument is the same as it was before the district court: An arrested person should not have to pay a statutory fee to the parish sheriff or clerk over and above the amount of bail they are required to post. First, and most significantly, they rely on *Augustus v. Roemer* to argue that an arrestee has a fundamental right "not to be deprived of or unreasonably inhibited from exercising [bail] once it has been favorably determined."[15] As a result, insist arrestees, the government must have a compelling interest to restrict that right. Imposing a monetary charge for the purpose of raising revenue, they assert, is not an adequate compelling interest. This fundamental-rights contention also provides a foundation for arrestees' equal protection and procedural due process claims.

Second, arrestees insist that charging bail-bond fees is akin to imposing costs of prosecution on an acquitted defendant. Third, they contend that the statutes are void on vagueness grounds because different sheriffs charge fees in differing amounts and maintain inadequate, ambiguous refund procedures. Fourth, arrestees assert that the bail-fee statutes tempt sheriffs to stack charges so as to fill their departments' coffers. This temptation, claim the arrestees, violates their procedural due process rights

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[15] 771 F. Supp. 1458, 1468 (E.D. La. 1991).

to "an impartial determination of the number of bookings." Fifth, they contend that these fees constitute excessive fines under the Eighth Amendment. Finally, they argue that charging a fee to exercise bail constitutes an unreasonable seizure of their person and property under the Fourth Amendment.[16]

In contrast, the sheriffs contend that the outcome of this case, at least with regard to the multi-sheriff statute, § 1432(9), is governed by our holding in *Enlow v. Tishomingo County*.[17] At issue in that case was a bail-fee statute that was quite similar to the one challenged here. The district court in *Enlow* rejected a procedural due process challenge to that statute's constitutionality, and we summarily affirmed the district court, concluding on the basis of our review of the briefs and record that the opinion was "well reasoned and [the case] correctly decided."[18] The sheriffs contend that the only difference between the Mississippi statute and Louisiana's bail-fee statute is that

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[16] The arrestees' remaining three distinct claims are meritless. They first argue that sheriffs are exceeding their authority *if* the statutes are construed to impose fees after conviction. The statutes, however, fairly clearly provide for fee collection before conviction, as that is when a bond is usually taken. Second, arrestees dispute the district court statement that they failed to show that any charges on arrestees had been dropped. As we explain, however, arrestees' claims fail because they are unable to show that the fees charged are arbitrary or to show that the fees caused a delay in release. Thus, whether any charges had been dropped is immaterial. Third, arrestees argue that dismissing the City of New Orleans was improper. Whether or not the City of New Orleans should be a defendant, however, depends on the merits of arrestees' claims. As a result, this issue does not warrant discussion unless the bail-fee statutes are held to be unconstitutional.

[17] 45 F.3d 885 (5th Cir. 1995).

[18] *Id.* at 889.

the Mississippi bail fee was calculated as a percentage of the bond, and the statewide Louisiana bail-fee statute assesses a fixed charge of fifteen dollars. This difference, they insist, is not material.

The sheriffs also deny that there is any fundamental right to free bail access, and rely on *Schilb v. Kuebel* to argue that the bail-fee statutes merely authorize valid administrative fees to support the bail-bond system.[19] As the statutes charge only administrative fees to defray the costs of the bail-bond system, continue the sheriffs, such fees do not impermissibly impose court costs; and for the same reason, such fees cannot violate the excessive fines clause of the Eighth Amendment. Finally, the sheriffs deny that (1) the statutes create any temptation to stack charges, (2) such laws are unconstitutionally vague, or (3) they effect a Fourth Amendment violation.

II. ANALYSIS

Louisiana's bail-fee statutes do not fit snugly into any established area of constitutional jurisprudence. This is quite plausibly the reason why arrestees fired such a broadside of constitutional claims at the sheriffs. As this is the third time these types of statutes have been challenged in this Circuit, and as the results of the previous efforts are in tension with each other, we shall address each of arrestees claims. Even though, in addition to the three laws at issue here, Louisiana's statutory framework provides multiple methods of funding its bail-bond system, relevant Supreme Court precedent characterizing such

[19] 404 U.S. 357 (1971).

charges as reasonable administrative fees requires us to affirm the district court on all matters, as we shall demonstrate.

A. STANDARD OF REVIEW

We review *de novo* a district court's grant of summary judgment.[20] Summary judgment is only appropriate if the pleadings and the additional evidence presented show that there is no genuine issue as to a material fact, such that the moving party is entitled to a judgment as a matter of law.[21] A dispute about a material fact is "genuine" if there is enough evidence for a reasonable jury to return a verdict in favor of the non-moving party.[22] Like the district court, when deciding upon a motion for summary judgment, we review all factual questions in the light most favorable to the nonmovant.[23] We also review *de novo* all questions of law.[24]

B. EIGHTH AMENDMENT EXCESSIVE BAIL

Arrestees only assert in passing that the bail-fee statutes amount to "excessive bail". It is nevertheless worthwhile to explain the inapplicability of the Eighth Amendment's Excessive Bail Clause to better frame these statutes under a more general due-process analysis.

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[20] *Stults v. Conoco, Inc.* 76 F.3d 651, 654 (5th Cir. 1996).

[21] Fed. R. Civ. P. 56(c).

[22] *Stults,* 76 F.3d at 654.

[23] *Id.*

[24] *Id.* at 655.

The Supreme Court has not frequently considered the contours of the Eighth Amendment's proscription of excessive bail. In fact, its application to the States has occurred only indirectly.[25] The Court has explained, nonetheless, that a prohibition against *excessive* bail exists even though there is no absolute constitutional right to bail. In *Stack v. Boyle,* the Court held that "[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is 'excessive' under the Eighth Amendment."[26] In applying this standard, we have found that requiring $750,000 bail from a defendant deemed to be a flight risk is *not* excessive even though the defendant is unable to pay the bail.[27]

More recently, in *United States v. Salerno,* the Supreme Court acknowledged that, in addition to the authority to detain for flight risk, the government may pursue "other admittedly compelling interests through regulation of pretrial release."[28] The only potential substantive limitation on the ability of the government to restrict bail, the Court concluded, is that "the Government's proposed

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[25] *Schilb v. Kuebel,* 404 U.S. 357, 365 (1971) (finding that "the Eighth Amendment's proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment") (citations omitted); *Baker v. McCollan,* 443 U.S. 137, 145 n.3 (1979).

[26] 342 U.S. 1, 5 (1951).

[27] *United States v. McConnell,* 842 F.2d 105, 107-08 (5th Cir. 1988).

[28] 481 U.S. 739, 753-54 (1987).

conditions of release or detention not be 'excessive' in light of the perceived evil."[29]

The above-cited cases address whether the government can deny bail altogether, or set it at a very high amount, for the reasons it proffers. In contrast, this case concerns neither the State's attempt to deny bail nor an extremely high bail amount. Rather, it concerns relatively modest fees imposed, over and above the amount of bail, on all arrestees who exercise bail. Clearly, the sheriffs are not advancing the compelling interests recognized by the Court in the cases mentioned above. Rather, they reiterate that the fee statutes are administrative charges imposed to cover costs of the bail-bond system. The sheriffs argue additionally that the fees at issue here are part of a more comprehensive statutory scheme that imposes fees for other actions taken by parish sheriffs in the criminal adjudication process.[30]

It is also clear that the restriction alleged in this case does not implicate the kind of excessiveness of past decisions. Rather, the charges are nominal, nondiscretionary, statutory fees imposed on all arrestees. Indeed, the deprivation arrestees claim here is more theoretical than actual. They have offered no hard evidence that any arrestee who was otherwise able to make bail was ever kept in jail because he or she did not, or could not, pay the *de minimis* administrative fee. Presumably, if an arrestee

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[29] *Id.* at 754. The Court explained further that the excessiveness of the government's action is determined as well by "the interest the Government seeks to protect by means of [its restriction]." *Id.*

[30] La. Rev. Stat. Ann. 33:1432.

is able to secure bail, he or she would be able to pay the modest administrative fee required to exercise that right. And, even if an arrestee were to remain in jail, it is still not clear that an additional fifteen dollars would constitute excessive bail under the Eighth Amendment. As a result, the interests at stake for both the government and the individual are not easily taken account of by the *Salerno* test.[31]

In sum, extant excessive-bail jurisprudence does not transfer well to this issue. *Salerno* and previous cases have indicated that the government must put forth a compelling interest to restrict or deny bail. Here, there is neither a compelling purpose nor a restriction on bail analogous to past instances. Rather there is a largely theoretical, and effectively minimal, constraint on an individual's substantial liberty interest in release.[32]

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[31] An analysis of these facts in excessive bail terms would result in an awkward application of the *Salerno* standard. The "perceived evil" would be the lack of funding for the bail-bond system rather than the flight risk, or danger to the community, of an arrestee. Likewise, the restrictions on release are small fees required to exercise bail instead of a large amount of money, which effectively would prohibit release on bail. Even though the "evil" does not amount to the compelling interest the government has in preventing flight, the restraint imposed also pales in comparison to high bail amounts.

[32] The "excessive bail" jurisprudence does illustrate the substantial interest an individual has in pretrial release from jail. The *Salerno* court reiterated that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755. We have also recognized that interest, stating that "[d]ue to weighty liberty interests, the typical pretrial detainee is rarely detained prior to trial." *Hamilton v. Lyons*, 74 F.3d 99, 105 (5th Cir. 1996). Thus, the need for a compelling purpose to restrict such release implies that an individual maintains a strong liberty interest.

Nothing in these cases has suggested that a theoretically minor restriction imposed for less than a compelling purpose, constitutes "excessive" bail.

C. EIGHTH AMENDMENT EXCESSIVE FINES

There are two reasons why arrestees' excessive-fines challenge fails here. First, the Supreme Court has never directly applied the Excessive Fines Clause of the Eighth Amendment to the several states. Although scholars have suggested,[33] and Justice O'Connor has argued,[34] that this clause applies to the states, to date no such attribution has occurred. Second, even assuming that this clause does apply to the states, the Court has concluded, and the district court here recognized, that "the State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in accordance with due process of law."[35] Therefore, allegations of punishment before adjudication of guilt must be addressed under the Due Process Clause of the Fourteenth Amendment.[36]

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[33] 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure, § 15.6, at 622 (1999) (arguing for the incorporation of this clause "because it is intertwined with the other two clauses of the Eighth Amendment and the Supreme Court has already regulated the imposition of fines on indigents through the equal protection clause of the Fourteenth Amendment").

[34] *See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J. concurring in part, dissenting in part) (urging that the "excessive fines" clause should apply to the states).

[35] *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

[36] *Id.*

The Excessive Fines Clause of the Eighth Amendment, like the Cruel and Unusual Punishment Clause, is applicable only if the statutory fees at issue constitute punishment.[37] But because the bail-fee statutes impose a charge prior to the adjudication of guilt, the Excessive Fines Clause, even if it did apply to the states, would not be the appropriate provision under which to test these statutes. As a result, we must assess the capacity of the bail-fee statutes to constitute punishment through the lens of the Due Process Clause.

D. DUE PROCESS – BAIL FEES AS PUNISHMENT

As neither the Excessive Bail Clause nor the Excessive Fines Clause of the Eighth Amendment is applicable to the bail-fee statutes challenged here, we must address the arrestees' more amorphous contention that the bail-fee statutes violate the fundamental right of bail-eligible arrestees to exercise bail without any additional financial impediment. Before addressing this due process contention directly, however, we must explain and distinguish three other cases relevant to this analysis on which the parties rely.

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[37] The Court has found that the Excessive Fines Clause "limits the government's power to extract payments, whether in cash or in kind, as *punishment* for some offense." *Austin v. United States,* 509 U.S. 602, 609-10 (1993) (internal quotation marks omitted) (emphasis in original). Thus, whether the clause applies depends on whether it is possible to describe the fees imposed as punishment. *See United States v. Bajakajian,* 524 U.S. 321, 328 (1998) (finding that forfeitures are fines "if they constitute punishment for an offense").

In *Schilb v. Kuebel,* the Court addressed a provision with effects remarkably similar to Louisiana's bail-fee statutes.[38] Illinois had instituted bail reform to enable arrestees to avoid the usurious fees of professional bail bondsmen. As part of this reform program, arrestees had the option of paying the court a deposit equal to 10% of their bail amount and thus obtaining release. Later, when they appeared at their hearings, such arrestees were refunded all but 10% (1% of the total bail amount) of the deposit, which the court retained as an administrative fee.[39]

The Court in *Schilb* addressed only an equal protection challenge and an argument that the fees constituted imposition of court costs prior to conviction. In rejecting both claims, the Court started from the premise that this charge "smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criterion."[40] The Court then analyzed, under the appropriate rational-basis standard, the fee retention in relation to the ability of arrestees to put up the entire amount of bail and thereby avoid fees entirely. Charging this fee to only those arrestees who elected to deposit an amount equal to 10% of their bail, reasoned the Court, was rationally related to the State's

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[38] 404 U.S. 357 (1971).

[39] *Id.* at 359-61.

[40] *Id.* at 365.

interest in defraying expenses that are associated with bail-jumping.[41]

The Court also distinguished this Illinois bail-fee statute from the one considered in *Giaccio v. Pennsylvania,* wherein the Court struck down a state law that allowed a jury to impose all court costs on a defendant even though it had acquitted him.[42] The *Schilb* court reiterated that the Illinois charge was "an administrative cost imposed upon all those, guilty and innocent alike" who avail themselves of its benefit, which was distinct from the "imposition of costs of prosecution upon an acquitted or discharged criminal defendant," illegal under Illinois law.[43]

Here, arrestees attempt to distinguish *Schilb* by highlighting the fact that the statute there at issue was part of a legislative movement to reform the Illinois bail-bond system and was but one option from which arrestees could choose.[44] Louisiana's statutory scheme, by contrast, is not as reform-minded as the Illinois program. The ability to distinguish *Schilb* from the instant case on the extent to which the fees charged go toward a program

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[41] *Id.* at 367-68. When the state takes only 10% instead of the entire 100% of the bail amount, it has less security in the event of bail-jumping. It also may be more likely that bail-jumping would occur under the deposit plan because the arrested individuals would forfeit less financially if they failed to appear in court.

[42] 382 U.S. 399, 403 (1966).

[43] *Schilb,* 404 U.S. at 370-71.

[44] Based on *Augustus v. Roemer,* 771 F. Supp. 1458 (E.D. La. 1991), arrestees argue that *Schilb* outlined a three factor test for such bail statutes: they must 1) create a voluntary option, 2) be intended to reform the bail system, and 3) confer a benefit on arrestees.

designed to benefit arrestees by reducing reliance on bail bondsmen is inconsequential, however, because the Louisiana bail-fee statutes involve no classification. The fee provisions at issue here apply to all arrestees, regardless of whether they enlist the services of a bail bondsmen or use their own funds to pay bail. Thus, the fact that the Louisiana statutes fail to classify dooms arrestees' equal protection claims and prevents them from positively distinguishing their challenge from the facts of *Schilb,* at least on equal protection grounds.[45]

In addition to the *Schilb* court's view that bail fees are at most administrative charges, which fail to invoke any fundamental right, the sheriffs argue that *Enlow v. Tishomingo County,* in which we upheld a statute similar to those at issue in this case, should govern our conclusion here.[46] At issue in *Enlow* was a Mississippi statute that imposed on every arrestee exercising his bail option a fee equal to the greater of $20 or 2% of the value of the bond.[47] The *Enlow* district court considered whether that statute violated procedural due process standards by imposing a fee prior to adjudication of guilt.[48] Applying *Mathews v. Eldridge,*[49] the trial court stated that payment of a bond fee did not amount to a heightened level of private

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[45] As we will explain, the differences between reform-oriented bail programs and Louisiana's scheme are likewise immaterial under the relaxed reasonableness standard that applies to due process challenges.

[46] 45 F.3d 885, 889 (5th Cir. 1995).

[47] *Enlow v. Tishomingo County,* Civ.A.No. EC 89-61-D-D, 1990 WL 366913, at *2 (N.D. Miss. Nov. 27, 1990).

[48] *Id.* at *5-6.

[49] 424 U.S. 319 (1976).

interest.[50] It reasoned that requiring a bond fee was legally indistinguishable from the accepted practice of requiring a detainee to post bond as a prerequisite for release.[51] The district court in *Enlow* also noted that sufficient standards and procedures existed to facilitate refunds after acquittal.[52] Finally, in addressing the government's administrative interests, the district court relied on *Schilb*'s conclusion that not all administrative fees are unconstitutional.[53]

We affirmed the *Enlow* trial court's holding and reasoning on appeal.[54] After reviewing the briefs and record, we concluded that "the district court's opinion regarding the arrestees' constitutional challenges to the statutes is well reasoned and correctly decided"[55] Despite the absence of substantive discussion, our affirmation of the district court's holding governs procedural due process challenges to similar bail-fee statutes, unless they can be factually distinguished.

The only differences between the Mississippi statutes at issue in *Enlow* and Louisiana's bail-fee statutes that we consider today are Mississippi's use of a percentage fee rather than a flat fee, and its statute's provision for the

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[50] *Enlow,* 1990 WL 366913, at *5.

[51] *Id.* (citing *Gladden v. Roach,* 864 F.2d 1196, 1200 (5th Cir. 1989) (upholding the ability to impose bail for a non-jailable offense because the gravity of the offense does not alter the purpose of bail to make sure defendants appear at trial)).

[52] *Enlow,* 1990 WL 366913, at *6.

[53] *Id.*

[54] *Enlow,* 45 F.3d at 889.

[55] *Id.*

State Auditor of Public Accounts to promulgate regulations outlining a refund procedure,[56] in contrast to the Louisiana statutes, which are more ambiguous in their provisions for refunds. The first difference at best is immaterial to a procedural due process analysis, because the quantum of the Louisiana fees imposed, and thus the private interest affected, is almost always going to be less than the quantum of those imposed under the Mississippi scheme. The second difference has an effect, if any, only when assessing the risk of error in existing procedures.

Given *Enlow*'s conclusions that the private interests at stake are not great, that *Schilb* specifically rejected a fundamental rights implication of such fees, and that arrestees have failed to demonstrate any actual deprivation, we too conclude that the Louisiana fees do not trigger any heightened level of private interest. Although the liberty interest of an arrestee in release from jail may well be significant, any deprivation attributable to these administrative fees is minimal, if not non-existent. Arrestees have introduced no evidence to suggest that any arrestee has ever been detained because of an inability to pay the bail fee. Arrestees have also failed to articulate a clear argument that these fees constitute a deprivation of a property interest without due process of law.[57]

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[56] Miss. Code Ann. § 99-1-19(5), (6) (1990) (repealed by Act of March 12, 1990, Ch. 329, § 12, eff. October 1, 1990).

[57] A recent district court case from Southern District of Ohio struck down a statute on procedural due process grounds that imposed a flat thirty dollar book-in fee to cover the administrative costs of confinement of pretrial detainees. *Allen v. Leis,* 213 F. Supp 2d 819, 831-34 (S.D. Ohio 2002). In conducting a *Mathews* analysis, the court held that this deprivation of property, like most, required notice and a hearing.

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The second factor is the so-called risk of error. In *Mathews,* the Court explained this factor as "the fairness and reliability of the existing pretermination procedures, and the probable value, if any, of additional procedural safeguards."[58] The district court here found a low risk of erroneous deprivation because the assessment of fees simply was based on the number of charges on which an individual is arrested.[59] The procedures for assessing fees are indeed unambiguous; it is not clear, however, that this completes the inquiry. This factor asks not only whether the state will determine the correct amount of deprivation, but also whether it will deprive the right individuals under the current procedures.

In *Enlow,* the district court concluded that the Mississippi statute contained sufficient procedures and standards to facilitate refunds to acquitted individuals. In contrast, the Louisiana statutes as they now stand, impose a fee on every individual arrested. Thus, the risk is fairly high that persons not ultimately found guilty will have paid this fee. According to *Enlow,* however, an adequate refund procedure would substantially minimize the risk of this kind of error. Louisiana's multi-sheriff statute provides for a "waiver" of the bail fee by a judge if an arrestee is acquitted or the charges dismissed. The Orleans parish

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Id. at 833-34. Here, however, *Enlow* has already concluded that the private interest is insignificant, and arrestees failed to pursue this line of argument.

[58] 424 U.S. 319, 343 (1976).

[59] *Broussard v. Parish of Orleans,* No. CIV.A.00-2318, CIV.A.00-3055, CIV.A.00-2056, CIV.A.00-3057, 2001 WL 1335289, at *8 (E.D. La. Oct. 29, 2001).

sheriff statute states that a judge may "suspend" this fee, but it does not explain the grounds on which suspension is appropriate. The Orleans clerk statute contains no procedure for obtaining a refund on acquittal or dismissal of charges.

Arrestees argue that the waiver language provides an insufficient procedure for obtaining a refund. Although the Louisiana multi-sheriff statute appears to provide less detail on refund procedures than does the Mississippi statute, this does not mean that it is wholly inadequate. The record indicates that in at least three parishes, refunds were made on request and that none were denied. Vernon Parish, for instance, which appears to have collected more bail fees than any other single parish, provided refunds for all thirty-seven requests made. This kind of evidence supports a conclusion that the multi-sheriff statute is capable of adequately providing a refund.

The arrestees also invoke the St. Charles Parish policy of making booking fees nonrefundable as evidence that the statutory waiver language is inadequate. The St. Charles Parish policy, however, is expressly provided for in Article 324(3) of the Louisiana Code of Criminal Procedure.[60] This provision authorizes St. Charles Parish to collect a deposit calculated as a percentage of the bail amount but to charge a fee no greater than fifteen dollars for processing a bond, which is the amount that the sheriff actually charged. As such, the procedure resembles the remedial program scrutinized in *Schilb*. We conclude that the possibility of a refund under the multi-sheriff statute

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[60] La. Code. Crim. Proc. Ann. art. 324(A)(3) (2002).

sufficiently mitigates any error that might occur beforehand in charging the fee.

The likelihood of refunds under the Orleans Sheriff and Orleans Clerk statutes is not as certain. The Orleans Sheriff statute only provides that a judge may *suspend* the fee requirement. This language suggests that there is some process before a fee is assessed, or at least some opportunity to request that a judge suspend the fee. The clerk statute provides for no suspension or waiver of this fee, but it imposes a fee of only five dollars, the least among the bail-fee statutes.

Finally, weighed against the deprivation and the risk of error is the administrative burden resulting from additional procedural requirements and the government's interests in conserving scarce resources.[61] This case deals with the imposition of nominal fees, and the government has an interest in continuing to assess such fees to support its bail-bond system. Greater process could ultimately reduce funding of the bail-bond system by increasing administrative costs and decreasing government revenue from such fees, because more acquitted arrestees are likely to obtain refunds.[62] Insufficient funding could detrimentally affect a sheriff's ability to supervise release on bail, which in turn could mean that fewer individuals actually

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[61] *Mathews*, 424 U.S. at 347-48.

[62] It would appear that the only effective procedures that would reduce deprivation and error would be the criminal adjudication itself or adequate refund procedures after acquittal. The former would not likely involve any additional procedures, but would delay the assessment of bail fees. The latter would allow bail fees to be assessed immediately, but might require more process later to dispense refunds.

secure release or that those released find it easier to jump bail. Thus, the government has an interest in the extant procedures to hold down costs and fund a sheriff's office's bail-bond system. The *de minimis* level of the private interest, moreover, indicates that the government administrative interest need not be great.

When we balance the *Mathews* factors, we conclude that none of the bail-fee statutes violates procedural due process standards. Although some risk of error exists for fees imposed under the Orleans Sheriff statute and the Orleans Clerk statute, the private interest at stake for all three statutes is minimal, as *Enlow* instructs, and the government interests in funding the bail-bond system and maintaining cost-effective procedures outweigh any error that may result from inadequate refund procedures. *Schilb*'s characterization of such charges as administrative fees lying beyond the threat of heightened constitutional scrutiny again influences our conclusion. It shows us that the government's administrative interest is reasonable and private deprivation so minimal that the risk of acquitted individuals paying the bail fee is an error without constitutional significance, akin to *danum absque injuria.*

Having found arrestees' equal protection and procedural due process claims to be unavailing, we turn to their substantive due process challenge. In contrast to the sheriffs' reliance on *Enlow,* arrestees ground their substantive due process argument on *Augustus v. Roemer,* a 1991 federal district court case that addressed another Louisiana statute, which imposed a charge on bail bondsmen equal to the greater of $20.00 or 2% of the amount of

the bond.[63] In striking down these provisions, the trial court determined that access to the bail system, once an arrestee was found eligible, constituted a fundamental right that could not be constricted absent a compelling governmental purpose.[64] The district court was not persuaded that raising revenue to run the criminal justice system and to handle the administration of bond forfeitures constituted compelling interests.[65] The court distinguished *Schilb* on the same grounds that arrestees rely on here: (1) The program was voluntary; (2) it had a narrowly tailored statutory purpose; and (3) it offered a benefit given in exchange for the fee.[66]

The district court's fundamental rights analysis in *Roemer* crumbles, however, under the weight of *Schilb* and other related Supreme Court precedent which indicate that these fees do *not* implicate fundamental rights and thus need only be reasonable.[67] In *Bell v. Wolfish,* the

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[63] 771 F. Supp. 1458, 1460-62 (E.D. La. 1991). In 1993, the Louisiana legislature repealed the statutes at issue in this case, but simultaneously enacted 22 L.S.A. R.S. § 1065.1, which imposes an identical 2% fee state-wide. *See* La. Acts 1993, No. 834, §§ 5, 6, eff. June 22, 1993.

[64] *Augustus,* 771 F. Supp. at 1467-68.

[65] *Id.* at 1468.

[66] *Id.* at 1470-71 & n.24.

[67] Arrestees also attempt to analogize the bail-fee statutes to the poll tax on voting that the Supreme Court struck down in *Harper v. Virginia State Bd. of Elections,* 383 U.S. 663 (1966). *Harper,* however, addressed the long-recognized fundamental right of voting, which the Court considered "preservative of other basic civil and political rights." *See id.* at 667 (*quoting Reynolds v. Sims,* 377 U.S. 533, 561-62 (1964)). This case addresses a fee imposed upon arrestees which neither the Supreme Court nor we have found invokes a fundamental right.

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Supreme Court addressed a substantive due process challenge to a condition of confinement of a pretrial detainee.[68] Although *Bell* addressed specific conditions of the confinement itself rather than potential barriers to release, its approach is instructive to our analysis of the arrestee's due process challenge to the Louisiana bail-fee statutes. The Court first rejected the lower court's conclusion that the "presumption of innocence" creates a fundamental right to be free from conditions of confinement, absent the government's compelling necessity.[69] The Due Process Clause, it reasoned, provides "no basis for application of a compelling-necessity standard to conditions of pretrial confinement that are not alleged to infringe any other, more specific guarantee of the Constitution."[70]

Rather, the Court concluded in *Bell* that when the right being challenged is not one that is expressly guaranteed in the Constitution, the issue merely concerns "the detainee's right to be free from punishment," which "does

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Instead, as we explain here, this type of charge requires only a reasonable relationship to a legitimate government purpose.

[68] 441 U.S. 520 (1979).

[69] *Id.* at 532. We have recognized the subsequent limits placed on *Bell* by the Supreme Court with regard to the level of culpability required to find a due process violation. *See Ortega v. Rowe,* 796 F.2d 765, 767-68 (5th Cir. 1986) (recognizing the Supreme Court opinions post-*Bell* that found negligent behavior insufficient to trigger due process protection, and as a result requiring intentional or knowing action to conduct a *Bell* analysis). These limits, however, are not relevant in this case because the mental state of the sheriffs is not in question.

[70] *Bell,* 441 U.S. at 533. As we explained *supra,* neither the Excessive Fines Clause, nor the Excessive Bail Clause, nor any other specific constitutional provision is applicable to the bail fee statutes.

not warrant adoption of [a] compelling-necessity test."[71] Using factors laid out in *Kennedy v. Mendoza-Martinez,* the Court ruled that if there is no express showing of an intent to punish, and "a particular condition or restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'"[72] On the other hand, if there is no reasonable relationship between the restriction and a legitimate interest, such that the restraint is "arbitrary or purposeless – a court permissibly may infer that the purpose of the governmental action is punishment . . . ."[73] Addressing the condition at issue in *Bell* – the practice of double-bunking at a pretrial detention facility – the Court concluded that the condition did not constitute punishment because the practice was instituted for the purpose of dealing with increased numbers of detainees and the burden on the detainees was minor.[74]

Bell may not be directly applicable to this case, because the bail-fee statutes might not constitute a condition or restriction on confinement as envisioned by *Bell* and subsequent cases. *Bell,* for instance, addressed the double-bunking of prisoners; and we subsequently addressed denials of such items as visitation, telephone access, recreation, mail, legal materials, and showers for a

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[71] *Id.* at 534.

[72] *Id.* at 538-39 (*citing Kennedy v. Mendoza-Martinez,* 372 U.S. 144 (1963)).

[73] *Bell,* 441 U.S. at 539.

[74] *See id.* at 525-26, 540-43.

three-day period.[75] Other circuits applying *Bell* have addressed such conditions as placement in solitary confinement after attacking another inmate,[76] administrative lockdown,[77] and administrative segregation.[78] In short, these cases deal with more restrictive confinement without release, not an added financial burden to already-sanctioned release.

Nevertheless, *Bell*'s analytical framework, in addition to *Schilb*'s conclusion that such fees appear to be administrative, is helpful in resolving this case. *Schilb* instructs that this category of fees fails to infringe any fundamental rights; *Bell,* in turn, articulates a test that enables us to determine whether such charges are reasonable administrative fees or impermissible arbitrary punishment. Thus, the inquiry reduces to a reasonableness analysis.

Reasonableness depends on both the nature of the government interest itself and the extent to which the statutes at issue supports that purpose. Section 1432(9), the multi-sheriff statute, imposes a fifteen dollar fine for "taking [an] appearance bond." The other two statutes impose fees for similar tasks. The district court indicated that these statutes "are linked to a legitimate government purpose of providing funds for the administration of the

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[75] *Hamilton v. Lyons,* 74 F.3d 99, 106-07 (5th Cir. 1996). The court's application of *Bell* in this case was slightly different because the plaintiff was a detained parolee instead of the average pretrial detainee. *Id.* at 104. That distinction, however, does not affect the type of confinement restriction subject to the *Bell* standard.

[76] *Rapier v. Harris,* 172 F.3d 999, 1001-02 (7th Cir. 1999).

[77] *O'Connor v. Huard,* 117 F.3d 12, 15-16 (1st Cir. 1997).

[78] *Stevens v. McHan,* 3 F.3d 1204, 1205-06 (8th Cir. 1993).

bail-bond system. . . . "[79] In their appellate brief, the sheriffs cite several provisions of the Louisiana Code of Criminal Procedure in support of their contention that the bail-bond system is entirely dependent on the services of the sheriff for its proper operation. In particular, the sheriffs emphasize that Article 344 of the Louisiana Code of Criminal Procedure requires the sheriff to serve notice on a defendant and his surety of a required appearance in court.[80]

The connection between these fees and the bail-bond system in particular is less than clear. The sheriffs seem to use Article 344's requirement that sheriffs give notice to arrestees to appear in court to demonstrate the significance of sheriffs in bail-bond matters. But even this requirement of sheriffs' time appears to be overstated. Article 344 requires no additional notice when a bail bond fixes the initial appearance date;[81] it is only when the bond does not fix such a date that additional notice required.[82] Such notice neither requires action by a sheriff nor personal service of the notice. Rather, it states simply that an officer of the court may deliver notice, or it may be sent via first class mail.[83] In short, the sheriffs appear to exaggerate both the amount of work involved and the time and effort required of sheriffs in this process.

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[79] *Broussard v. Parish of Orleans,* No. CIV.A.00-2318, CIV.A.00-3055, CIV.A.00-2056, CIV.A.00-3057, 2001 WL 1335289, at *8 (E.D. La. Oct. 29, 2001).

[80] La. Code Crim. Proc. Ann. art. 344 (2002).

[81] Art. 344(A).

[82] Art. 344(B).

[83] Art. 344(B)(2).

In addition, Louisiana already charges fees directly to bail bondsmen. Section 1065.1 of Title 22 of the Revised Statutes charges a 2% fee on "all commercial surety underwriters who write criminal bail bonds in the state of Louisiana."[84] This statute specifies that 25% percent of the amount collected goes to the "sheriff's general fund" and that other amounts go to the judicial court fund, the district attorney's operating fund and the Indigent Defenders program. As a result, this provision seems to address more directly the overall financing of the bail-bond system. It specifies distribution of funds not just to the sheriff, but also to the other groups that participate in the bail-bond system. In short, there are reasons to question the extent to which the bail-fee statutes at issue support the bail-bond system.

There are also reasons, however, that supply a rational connection between these statutes and a legitimate government purpose. Despite the sheriffs' failure to elaborate on their contention, we can imagine that bail fees help offset the costs of paperwork and subsequent time required of sheriffs or clerks to keep track of those arrestees who are out on bail. Arrestees have presented no evidence to demonstrate that such fees are unnecessary or to show that alone the funds received from the bail bondsmen tax and from bond forfeitures are sufficient to support the bail-bond system.

Furthermore, the broader statutory scheme of which these provisions are a part provides additional support for the characterization of these bail fees as reasonable

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[84] La. Rev. Stat. Ann. § 22:1065.1 (2003).

administrative charges. They are part of a comprehensive schedule of fees for actions taken by a sheriff or clerk, including fees for serving a subpoena duces tecum,[85] for mileage when traveling outside the Parish of Orleans,[86] for executing warrants outside of the sheriff's parish,[87] and for furnishing copies of indictments.[88] Although the bail-fee provisions may be unique as the only provisions that theoretically separate an arrestee from his or her release from confinement, the amount of the fee does not appear to be unduly burdensome. As noted, the record is barren of evidence indicating that a single arrestee had to remain in jail because he or she was unable to pay the required fees, as distinguished from the bail itself.

Even though the connection between the bail fees charged and the administration of the bail-bond system may be somewhat tenuous, especially when compared to reform schemes in other states, arrestees have failed to present evidence sufficient to show that the fees imposed are arbitrary. Thus, we must reject arrestees' substantive due process challenge as well.[89]

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[85] La. Rev. Stat. Ann. § 33:1520(8) (2002).

[86] § 33:1520(10).

[87] La. Rev. Stat. Ann. § 33:1432(7) (2002).

[88] La. Rev. Stat. Ann. § 13:1381(24) (1999).

[89] Arrestees also rely on the ancient case of *State ex rel. Leche v. Waggner*, 8 So. 209, 211 (La. 1890), which struck down a statute almost identical to the Orleans Clerk statute. Although to our knowledge no case has overruled *Waggner*, we discern two reasons why its holding does not govern here. First, the *Waggner* court failed to articulate the basis on which it found this statute offensive, which makes it impossible for us to determine whether it would even be persuasive precedent to our federal constitutional analysis. Second, *Schilb* and *Bell* have

(Continued on following page)

E. OTHER CONSTITUTIONAL CLAIMS

1. Vagueness Challenge

Arrestees contend that the bail-fee statutes are void on vagueness grounds, relying on *Giaccio v. Pennsylvania.*[90] Arrestees also attempt to use *Giaccio* to support their argument that the bail fees constitute impermissible court costs.

In *Giaccio,* the Supreme Court addressed a Pennsylvania law allowing juries that had acquitted a defendant to determine whether he should nevertheless pay all court costs of the prosecution.[91] The Court struck down the law as vague because it gave juries "broad and unlimited power in imposing costs on acquitted defendants," such that it allowed them to use "their own notions of what the law should be instead of what it is."[92]

The bail fees charged here, in contrast, are not factually akin to the costs of prosecution. Although both situations might involve fees charged to individuals who are ultimately acquitted, the *Giaccio* court found particularly problematic the unfettered power of jurors to impose their own view of the law in assessing fees. The Louisiana statutes here at issue are well-defined laws which clearly outline the fees charged. The fees themselves are small, and no judicial or executive officers are empowered to

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been decided subsequently by the United State Supreme Court, and quite clearly characterize such charges as administrative fees, which need only relate reasonably to a legitimate government interest.

[90] 382 U.S. 399.

[91] *Id.* at 400.

[92] *Id.* at 403.

charge fees greater than those that are statutorily allowed.

Neither are these fee statutes unconstitutionally vague. In *Buckland v. Montgomery County,* a case factually more similar to ours than is *Giaccio,* the Third Circuit addressed a vagueness challenge to a Pennsylvania program identical to the Illinois program considered in *Schilb,* except that the Pennsylvania statute provided for retention of a "reasonable fee," instead of a set 1% of the total bail amount.[93] The *Buckland* court rejected the vagueness challenge, finding that fees were established in the public record and were applied uniformly and with advance knowledge to those using the court bail program.[94] Further, the variation in fees simply reflected the differing local conditions and expenses of the different geographical areas in which they were imposed.[95] Similarly, the fee amounts we consider today are stated clearly in the public records. Even though sheriffs may employ different practices for assessing such fees, there is no evidence that any sheriff has charged more than the statutorily allowed amount.

2. Temptation to Stack Charges

Arrestees also assert that these statutes tempt sheriffs to stack charges against arrestees in violation of their due process rights. Arrestees rely on *Ward v. Village of*

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[93] 812 F.2d 146, 149 (3rd Cir. 1987).

[94] *Id.*

[95] *Id.*

Monroeville[96] and *Tumey v. Ohio*[97] to argue that these statutes give sheriffs the partisan incentive to make unnecessary charges to maintain sufficient funding for their respective departments. Conceding that *Ward* and *Tumey* applied to judges and focused on the requirement that they remain impartial, arrestees nevertheless insist that this standard should apply to the Louisiana sheriffs and clerks as well, and attempt – unsuccessfully – to distinguish our holding in *Brown v. Edwards.*[98] In making their argument, arrestees seem to presuppose that the fees are analogous to punishment or to a determination of guilt before trial. That is the basis on which they argue that sheriffs impermissibly control executive and judicial functions, in violation of due process. As the preceding analysis has illustrated, however, imposing fees does not constitute "punishment" under *Bell;* thus arrestees' reliance on *Ward* and *Tumey* is unavailing.

The district court's dismissal of this challenge is sound. It correctly noted that *Ward* and *Tumey* are inapplicable to this case, because the focus of those cases was on individuals who exercised a judicial function. "[T]he test is whether [the individual's] situation is one 'which would offer a possible temptation to the average man *as a judge* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the

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[96] 409 U.S. 57, 59-60 (1972).

[97] 273 U.S. 510, 532 (1927).

[98] 721 F.2d 1442 (5th Cir. 1984).

balance nice, clear and true between the State and the accused . . . .' "[99]

In *Brown v. Edwards,* we reiterated the significance of the function exercised in determining a violation of due process.[100] Rejecting a challenge to a statute that enables Mississippi constables to collect ten dollars for each charge that results in a conviction, we emphasized that "an arrest by a constable is not judicial action, but action under executive or legislative authority."[101] We concluded, moreover, that peace offers are not expected to exercise the same level of impartiality and neutrality as judges and magistrates.[102]

Brown is controlling here. Neither the sheriffs nor the clerks exercise, or are supposed to exercise, a judicial function. Thus, like constables, they are not expected to maintain a level of impartiality equal to that expected of judges. Consequently, a decision to make multiple charges and impose concomitant fees would not conflict, at least under relevant precedent, with any budgetary control they might maintain. As in *Brown,* arrestees have not challenged the lawfulness of the original arrests. Assuming the existence of valid probable cause, which arrestees give us

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[99] *Ward,* 409 U.S. at 59 (citing *Tumey,* 273 U.S. at 532) (emphasis added).

[100] 721 F.2d at 1451.

[101] *Id.*

[102] *Id.* Arrestees incorrectly argue that *Brown* stands for the proposition that no temptation to stack charges exists when a constable only received fees on successful charges and after conviction. The *Brown* court, however, grounds much of its holding in the fact that constables are not judges, nor do they exercise a judicial function. *Id.*

no reason to question, the sheriffs are simply carrying out their statutory prerogative of assessing fees based on the charges brought.

3. Fourth Amendment Challenge

Arrestees finally assert that being charged fees in conjunction with bail release constitutes an unreasonable seizure of their person and property under the Fourth Amendment. They cite no cases to support this proposition; instead, they would liken the bail-fee requirement to the crimes of aggravated kidnapping and extortion, which is obviously inapt.

In rejecting this challenge, the district court relied on the facts that arrestees neither challenged the validity of their arrest and initial detainment, nor put forth any evidence that in fact they were unreasonably detained as a result of the bail fee.[103] We agree with the reasoning and holding of the district court on this issue. As the arrestees do not challenge their initial arrest and confinement, i.e. they do not allege that the sheriffs lacked warrants or probable cause, and as there is no evidence of unreasonable delay in release, there simply is no demonstration of a Fourth Amendment problem. Thus, there is neither legal nor factual support for arrestees' Fourth Amendment argument.

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[103] *Broussard v. Parish of Orleans,* No. CIV.A.00-2318, CIV.A.00-3055, CIV.A.00-3056, CIV.A.00-3057, 2001 WL 1335289, at *8 (E.D. La. Oct.29, 2001).

III. CONCLUSION

We discern no merit in any of arrestees' myriad arguments attacking the constitutionality of the several Louisiana bail-fee statutes here at issue. Although the facts of this case differ slightly from those addressed in *Schilb* and *Bell,* their holdings nevertheless adequately frame our approach to this case. As bail-fee statutes, these provisions are relegated to the mundane realm of administrative concern, never mounting the high pedestal of the kind of scrutiny required for fundamental rights. Furthermore, even if these fees were to constitute restrictions on confinement, they would only need to be reasonably related to a legitimate government purpose. Even though the sheriffs' reasons for charging these fees are relatively weak, we nonetheless find that such fees relate sufficiently to the bail-bond system to keep them from being arbitrary. Finally, arrestees have failed to adduce evidence that any among them was actually detained for a longer period of time because of such fees, or that such fees lack any reasonable connection to administration of the bail-bond system, without which all their claims must fail. For the foregoing reasons, therefore, the judgment of the district court is, in all respects,

AFFIRMED.

2001 WL 1335289 (E.D. La.)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL.	CIVIL ACTION
VERSUS	NO. 00-2318 c/w 00-3055, 3056, 3057
PARISH OF ORLEANS, ET AL.	SECTION: "R" (2)

ORDER AND REASONS

(Filed Oct. 29, 2001)

Before the Court are defendants', Fifty-Two Sheriffs ("Sheriffs") and the Clerk of Criminal District Court in Orleans Parish ("Clerk"), motions to dismiss pursuant to Rule 12(b)(6) and 12(c).[1] For the following reasons, the Court dismisses plaintiffs' claims.

1. BACKGROUND

Plaintiffs brought these class actions against all of the sheriffs of Louisiana, individually and in their official capacities, except the Sheriff of Orleans Parish, and against the Clerk of Criminal District Court in Orleans Parish to challenge the constitutionality of Louisiana Revised Statute § 33:1432(9) and Louisiana Revised Statute § 13:1381(3), which authorize defendants to collect a fee for processing appearance bonds before a defendant

[1] Seven additional sheriffs defendants adopted the motion of the Fifty-Two Sheriffs: Litchfield, Deen, Prator, Huckabay, Lombard, Champagne, and Jones.

has been convicted of a criminal offense. A similar action was brought against the Sheriff of Orleans Parish challenging the fee statute applicable to Orleans Parish.[2] All of the actions have been consolidated.

Louisiana Sheriffs and the Criminal District Court Clerk of Orleans Parish have statutory authority to charge a fee for the taking and filing of appearance bonds in criminal matters. The statute applicable to the Sheriffs is Louisiana Revised Statute § 33:1432, which provides as follows:

> The compensation, fees, and costs allowed sheriffs, the parish of Orleans excepted, for all services in criminal matters, shall be the following:
>
> . . .
>
> (9) For taking appearance bond when required to do so, fifteen dollars, unless suspended by a judge of the district court of the parish. A judge of a district court shall waive this fee if a defendant has been tried and found not guilty or if the charges against the defendant are dismissed.

LA. REV. STAT. § 33:1432(9).

The bail bond system in Louisiana is provided for in the Louisiana Code of Criminal Procedure. *See* LA. CODE CRIM. PROC. arts. 311, *et seq.* Sheriffs have administrative responsibilities in connection with the bail bond system, such as giving notices required under the bail statutes. *See* LA. CODE CRIM. PROC. art 344B.(1).

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[2] The City of New Orleans has filed a separate Motion to Dismiss.

The Clerk derives his authority to collect the challenged fee from La. R.S. § 13:1381, which authorizes him to collect fees for processing appearance bonds, as follows:

> The following charges may be made for the services of the clerk of the criminal district court:
>
> . . .
>
> (3) For filing and processing of appearance or witness bond, five dollars.

LA. REV. STAT. § 13:1381(3).

The plaintiffs were at one time arrested and determined eligible for bail. Some of the plaintiffs in the suit against the Sheriffs were required to pay the requisite fees for the appearance bonds, while other plaintiffs were required only to promise to pay the fee before being released. Some sheriffs billed a flat fee, and other sheriffs based their calculations on the number of bail bonds posted, which correlates to the number of charges levied against the arrestee. Additionally, the usual practice of the Sheriffs is to retain the money, regardless of whether the charges against an individual are dismissed or he is found not guilty. In the suit against the Clerk, the plaintiffs were all charged a five dollar fee for the filing and processing of appearance bonds pursuant to Section 1381. No plaintiff in either class has ever sought a refund of his money, and the plaintiffs challenging Section 1432 do not allege that they were acquitted or that the charges against them were dismissed.

Plaintiffs sued defendants under 42 U.S.C. § 1983, alleging violations of their Fourth, Eighth, and Fourteenth Amendment rights. Plaintiffs contend that the appearance bond fee statutes, Section 1432(9) and Section 1381(3), are

facially unconstitutional and unconstitutional as applied. Plaintiffs seek damages, preliminary and permanent injunctions against the enforcement of the statutes, declaratory judgments regarding the constitutionality of the statutes, and attorneys' fees under 42 U.S.C. § 1988.

II. Discussion

A. Legal Standard

Defendants move to dismiss this action for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) and for a judgment on the pleadings under Rule 12(c). The Court converts defendants' motions to a motion for summary judgment under Rule 56 because matters outside of the pleadings have been presented to and not excluded by the Court. *See* FED. R. CIV. P. 12(b)(6) and 12(C).

Summary judgment is appropriate when there are no genuine issues as to any material facts, and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 2552 (1986). A court must be satisfied that no reasonable trier of fact could find for the nonmoving party or, in other words, "that the evidence favoring the nonmoving party is insufficient to enable a reasonable jury to return a verdict in her favor." *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990) (*citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986)). The moving party bears the burden of establishing that there are no genuine issues of material fact.

If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its burden by merely pointing out that the evidence in the record contains insufficient proof concerning an essential element of the nonmoving party's claim. *See Celotex,* 477 U.S. at 325, 106 S. Ct. at 2554; *see also Lavespere,* 910 F.2d at 178. The burden then shifts to the nonmoving party, who must, by submitting or referring to evidence, set out specific facts showing that a genuine issue exists. *See Celotex,* 477 U.S. at 324, 106 S. Ct. at 2553. The nonmovant may not rest upon the pleadings but must identify specific facts that establish a genuine issue exists for trial. *See id.* at 325, 106 S. Ct. at 2553-54; *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1996).

B. Section 1983

Plaintiffs assert claims under 42 U.S.C. § 1983 for violations of their rights under the Fourth, Eighth, and Fourteenth Amendments. To state a claim under Section 1983 a plaintiff must (1) allege a violation of a right secured by the Constitution or laws of the United States and (2) demonstrate that the alleged deprivation was committed by a person acting under color of state law. *See Moore v. Willis Independent School District,* 233 F.3d 871, 874 (5th Cir. 2000). All defendants stipulate that the second requirement for stating a Section 1983 claim is met here. (Trial Stipulations by Fifty-Two Sheriff-Defendants at #2; Trial Stipulations by Clerk of Criminal District Court at #2). The Court will focus on whether plaintiffs' present genuine issues of material fact that their constitutional rights were violated.

Plaintiffs challenge each statute as unconstitutional on its face and as applied. With a facial challenge, the proper inquiry is whether the mere enactment of the statute effects a constitutional deprivation. *See Brockett v. Spokane Arcades, Inc.* 742 U.S. 491, 501-02, 105 S.Ct. 2794, 2800-01 (1985); *see also Augustus v. Roemer,* 771 F.Supp. 1458, 1462 (E.D. La. 1991). To evaluate such a challenge, the Court "must . . . consider any limiting construction that a state court or enforcement agency has proffered." *See Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 1191 n.5 (1982). In an "as applied" challenge, the plaintiff must demonstrate that the statute is unconstitutional as applied to him. *See Seling v. Young,* 531 U.S. 50, 121 S.Ct. 727, 730 (2001).

C. Fourth Amendment Claim

The Fourth Amendment establishes the right to be free from unreasonable searches and seizures and requires that no warrants issue except upon probable cause. *See* U.S. Const. amend. IV. The "touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno,* 500 U.S. 248, 250, 111 S.Ct. 1801, 1803 (1991). Traditionally, the reasonableness inquiry is applied to Fourth Amendment claims of excessive force during arrest, investigatory stops, or other seizures. *See Blackwell v. Barton,* 34 F.3d 298, 302 (5th Cir. 1994) (*citing Graham v. Connor,* 490 U.S. 386, 109 S.Ct. 1865 (1989)) (applying the reasonableness standard to a claim of illegal arrest based on mistaken identity). When it applies the reasonableness test, the Supreme Court "eschew[s] bright line rules," and emphasizes the "fact-specific nature of the reasonableness inquiry." *Ohio v. Robinette,* 519 U.S. 33, 39, 117 S.Ct. 417,

421 (1996). Although this case does not deal with excessive force, the reasoning of *Graham* is equally applicable to the plaintiffs' claims of unlawful seizures of their person and property. *See Blackwell,* 34 F.3d at 302.

Plaintiffs allege that they were forced to pay or promise to pay the challenged fees or face further pretrial detention even though they qualified for bail and posted bond. (00-3055 Pl.'s Cmpl. ¶¶ 19(a)-(b); 00-3057 Pl.'s Cmpl. ¶¶ 16-17). Under even the most generous reading of these facts, plaintiffs cannot make out a claim that the statutes are unconstitutional as applied to them. First, plaintiffs do not challenge the validity of their arrests and do not claim that they were improperly in police custody at the time the fees were assessed by the Sheriffs or the Clerk. Furthermore, plaintiffs do not allege that they were detained for any length of time beyond the point at which they posted their bail bonds. In fact, the plaintiffs admit that they paid the fees and were released. (00-3055 Pl.'s Cmpl. ¶¶ 19(a)-(b); 00-3057 Pl.'s Cmpl. ¶ 17). Therefore, because plaintiffs have not shown that they were unlawfully seized or detained for any unreasonable length of time, the plaintiffs have failed to show that there is a genuine issue of material fact on their Fourth Amendment claim that the statutes are unconstitutional as applied to them.

A facial challenge to the statutes on Fourth Amendment grounds also fails. The statutes simply authorize sheriffs and clerks to collect an administrative fee for the bail bond system. *See Schilb v. Kuebel,* 404 U.S. 357, 365, 92 S.Ct. 479, 484-85 (1972) (declaring that a bail fee statute "smacks of administrative detail and of procedure and is hardly classified as a fundamental right . . . "). The statutes provide for the collection of fees from arrestees in exchange for the benefit of participating in the bail bond

system that relies on the fees to fund its administration. Clearly, the mere enactment of the statutes does not effect a constitutional deprivation; it simply creates a system for funding a program that benefits the plaintiffs. Accordingly, the Court finds the plaintiffs' facial challenge to the statutes on Fourth Amendment grounds to be without merit.

D. Eighth Amendment Claims

The Eighth Amendment applies to the states through the Fourteenth Amendment. *See Harmelin v. Michigan,* 501 U.S. 957, 962, 111 S.Ct. 2680, 2683 (1991). It provides: "Excessive bail shall not be required, no excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Supreme Court has made it clear that the Eighth Amendment protects only those who have been convicted of a crime. *See Thibodeaux v. Bordelon,* 740 F.2d 329, 333-34 (5th Cir. 1984) (*citing Ingraham v. Wright,* 430 U.S. 651, 664, 671-72, 97 S.Ct. 1401, 1408, 1412-13 (1977)). It does not protect pretrial detainees. *See id.* (*citing Bell v. Wolfish,* 441 U.S. 520, 535 n. 16, 99 S.Ct. 1861, 1872 n.16 (1979). The Court explained in *Ingraham* that if a state seeks to impose punishment before there is a conviction of a crime, the proper inquiry is under the Due Process Clause of the Fourteenth Amendment.

> "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions . . . [T]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt in

> accordance with due process of law. Where the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." 430 U.S. at 671 n.40, 97 S.Ct. at 1412 n.40

Because the plaintiffs were pretrial detainees when they sustained their alleged injuries, their claims under the Eighth Amendment are without merit. The Court will analyze these claims under the Due Process Clause of the Fourteenth Amendment.

E. Fourteenth Amendment Substantive Due Process Claim

To prevail on a substantive due process claim a plaintiff must first establish that it held a constitutionally protected right to which the Fourteenth Amendment's due process protection applies. *See SIMI Investment Company, Inc. v. Harris County,* 236 F.3d 240, 249-50 (5th Cir. 2000). Once the right has been established, the court must consider whether the denial of the right is rationally related to a legitimate government interest. *See id.* at 251.

The Supreme Court has already declared that the Excessive Bail Clause "of course, says nothing about whether bail shall be available at all." *United States v. Salerno,* 481 U.S. 739, 752, 107 S.Ct. 2095, 2104 (1987). What defendants do have is a right to be free from excessive bail in those cases in which it is proper to grant bail. *See Carlson v. Landon,* 342 U.S. 524, 545-46, 72 S.Ct. 525, 536-37 (1952). Although the Supreme Court has never actually applied the Excessive Fines Clause, it has explained that at the time the Constitution was adopted, "the word 'fine' was understood to mean a payment to a

sovereign as punishment for some offense." *United States v. Bajakajian,* 524 U.S. 321, 327, 118 S.Ct. 2028, 2033 (1998) (*quoting Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal,* 492 U.S. 257, 265, 109 S.Ct. 2909, 2915 (1989)). The Excessive Fines Clause thus "limits the government's power to extract payments for some offense." *See id.* at 328 (*quoting Austin v. United States,* 509 U.S. 602, 609-610, 113 S.Ct. 2801, 2805 (1993) (emphasis deleted)).

Plaintiffs argue that the payment of or the promise to pay the challenged fees constructively denied them their "fundamental substantive due process right to access the bail system." (Pl's Tr. Brief and Opp. to Def's Mot. to Dis. 27). Second, they contend that the levy of a pretrial fee on an individual who is presumed innocent is per se excessive and prohibited by the Excessive Fines Clause. (Pl's Tr. Brief and Opp. To Def's Mot. to Dis. 27-28).

In *Schilb v. Kuebel,* petitioner challenged the constitutionality of a bail bond fee statute under which 1% of the amount of bail was retained by the clerk as bail bond costs. The statute applied to any person who secured his release on a bail bond by posting a cash deposit equal to a percentage of the bail amount. The fee was imposed upon those who were acquitted, as well as upon those who were found guilty. The Supreme Court in *Schilb* unequivocally stated that the bail fee law did not involve any fundamental rights under the Bail Clause or raise any constitutional issue of excessive bail:

> "[W]e are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of

> bail excessiveness . . . This smacks of administrative detail and of procedure . . . " *Schilb,* 404 U.S. at 365, 92 S.Ct. at 485.

Schilb disposes of plaintiffs' arguments that the pretrial bail bond fee is per se excessive or that such a fee violates any fundamental right. Further, fees of fifteen dollars (or multiples thereof) and five dollars do not make bail excessive. In fact, plaintiffs admit that they were able to pay the fees in order to obtain their release from jail and do not allege that they were indigent. (00-3055 Pl.'s Cmpl. ¶¶ 19(a)-(b); 00-3057 Pl.'s Cmpl. ¶ 17). Further, the Court finds that the statutes are rationally related to a legitimate government purpose of financing the administration of the bail bond system. *See* discussion, *infra,* at 20-21.

As to the "Excessive Fines" claim, plaintiffs fail to demonstrate how the fees can be described as punishment, especially when the Sheriffs and the Clerk of Court perform administrative functions in connection with the appearance bonds. Indeed both statutes describe the fees as imposed for administrative services in connection with the bonds. Further, Section 1432(9) provides for the "waiver" of the fees upon the dismissal of the charges or a not-guilty verdict. *See Bajakajian,* 524 U.S. at 327, 118 S.Ct. at 2033. Even if it did not, this would not be fatal to its legality. The Court in *Schilb* rejected an argument like the one made here that a bail bond fee assessed on the guilty and acquitted alike was a vehicle for imposing the costs of prosecution upon the innocent, which was prohibited by *Giaccio v. Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518 (1966). Rather, the Court held that the fee was an administrative cost imposed upon all who sought the benefit of the bail bond statute. *See Schilb,* 404 U.S. at 370-71, 92

S.Ct. at 487. Further, Louisiana expressly prohibits the imposition of the costs of prosecution upon acquitted defendants. *See* LA. CODE CRIM. PROC. art. 887. *See also Schilb,* 404 U.S. at 370-31, 92 S.Ct. at 487. Based upon *Schilb* and the nature of these charges as administrative costs of the appearance bonds, plaintiffs' arguments under *Giaccio* are unavailing. Therefore, the Court finds that the plaintiffs' substantive due process claims are without merit.

F. Other Due Process Claims

Plaintiffs assert that the statutes are infirm under the rationale of cases like *Ward v. Village of Monroeville,* 409 U.S. 57, 58, 93 S.Ct. 80, 82 (1972), and *Tumey v. Ohio,* 273 U.S. 510, 47 S. Ct. 437 (1927). Both of these cases found constitutional violations when mayors acted as judges in cases in which the mayors or their offices benefitted financially from every conviction. The Court said that the test under these circumstances is whether the public official's situation "is one which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Ward,* 409 U.S. at 60, 93 S.Ct. at 83 (*quoting Tumey,* 273 U.S. at 532, 47 S. Ct. at 444). Plaintiffs assert that the statutes at issue tempt sheriffs to impose multiple bookings upon arrestees to raise revenue for the sheriff's office in violation of the principles of *Tumey* and *Ward.* (Pl's Tr. Brief and Opp. to Def's Mot. to Dis. 29).

Ward and *Tumey* have no application here. This case does not involve the determination of the plaintiffs' guilt or

innocence, nor does it involve placing the Sheriffs or the Clerk in conflicting prosecutorial and judicial roles. The Clerk acts as neither a prosecutor nor a judge in handling appearance bonds, and the Sheriff is not performing a judicial function when he decides on the number of charges on which he will book a defendant. In *Brown v. Edwards,* 721 F.2d 1442, 1451 (5th Cir. 1984), the Fifth Circuit held that an arrestee's due process rights were not violated when he was arrested by a constable who was compensated under Mississippi law for each arrest that resulted in a conviction. The Court found *Ward* and *Tumey* to be inapplicable because the constable was not expected to be neutral, and he performed no judicial function. The same reasoning applies here.

Plaintiffs also argue that the Louisiana statutes are facially unconstitutional because they fail to provide procedures or standards for waiving or refunding the fees. (Pl's Tr. Brief and Opp. to Def's Mot. to Dis. 30-33). As noted, *Schilb* indicates that constitutional validity does not depend on whether the fee is refunded to those who ultimately are not convicted. Further, the *Schilb* court refused to invalidate the fee statute for lack of standards. Here, the Louisiana statutes, like the one in *Schilb,* are nothing more than administrative costs imposed upon those who take advantage of the State's bail bond system. Section 1432(9) even provides a procedure for the return of the funds:

> A judge of the district court of the parish shall waive this fee if a defendant has been tried and found not guilty or if the charges against the defendant are dismissed. LA. REV. STAT. § 33:1432(9).

Plaintiffs' lack of standards argument is therefore without merit.

Although plaintiffs argue that the Sheriffs ultimately retain the fees, even when charges are dropped or there is an acquittal, this would not render Section 1432(9) vague on its face, since its language is clear. Additionally, it is not the Sheriffs who are charged with waiving the fees, but the district courts. Moreover, plaintiffs fail to show that the class representative who challenges Section 1432(9) had the charges against him dropped or was acquitted, or that any class member asked for and was denied a waiver of the fee after he was acquitted or had the charges dropped.

This Court has found no circuit court authority that has invalidated appearance bond fees on due process grounds. Moreover, in *Enlow v. Toshmingo County, MS,* 1990 WL 366913 (N.D. Miss. 1990), *aff'd,* 45 F.3d 885 (5th Cir. 1995),[3] the Fifth Circuit affirmed the district court's refusal to invalidate a Mississippi bond fee statute, and the Third Circuit reached a similar conclusion in *Buckland v. County of Montgomery,* 812 F.2d 146 (3d Cir. 1987) (holding that bail fee statute did not deny due process).

In *Enlow,* the Fifth Circuit affirmed the district court's determination that "a bond fee would be afforded the same favorable constitutional consideration" as the Fifth Circuit afforded the requirement that a defendant post bond as a precondition of release following arrest. *See*

[3] Based on the Fifth Circuit's decision in *Enlow,* plaintiffs mistakenly rely on *Augustus v. Roemer,* 771 F.Supp. 1458, 1462 (E.D. La. 1991). *Enlow,* not *Roemer,* is binding authority.

id. The Fifth Circuit had already held that requiring defendants to post bond as a precondition to release following arrest does not violate due process. *See Gladden v. Roach,* 864 F.2d 1196, 1200 (5th Cir. 1989), *cert. denied,* 491 U.S. 907, 109 S.Ct. 3192 (1989). The bond fee statute found constitutional in *Enlow* provided:

> Upon every defendant charged with a criminal offense who posts a cash bail bond, a surety bail bond or property bail bond conditioned for his appearance at trial, there is hereby imposed a fee equal to two percent (2%) of the face value of each bond or twenty dollars ($20), whichever is greater. Miss. Code Ann. § 99-1-19(2) (repealed by Act of March 12, 1990, Ch. 329, § 12, 1990 Miss. Laws).

A related provision provided for the return of the two percent bail fee when the defendant was acquitted. *See Enlow,* 1990 WL 366913 at *2.

The district court in *Enlow* found no due process problem, pointing out that, "[p]laintiffs have presented no case, Fifth Circuit or otherwise, which likens the payment of a bond fee to such a heightened level of private interest" as is afforded the garnishment of a person's wages or the seizure of a debtor's bank account. *Enlow,* 1990 WL 366913 at *5 (finding that sufficient procedures existed because a person acquitted could seek return of the fee). Balancing all of the factors: a relatively minor private interest (an administrative fee), a low risk of erroneous deprivation (determining the amount of fees charged is simply tied to the number of charges on which individual is arrested), versus the government's interest in maintaining the bail bond system and the administrative burdens inherent in additional procedural requirements, this Court

finds that the waiver procedure provided for in Section 1432(9) more than satisfies due process requirements under the Fourteenth Amendment. Further, that Section 1381 does not provide a waiver procedure for the minimal five dollar fee does not render it unconstitutional, because *Schilb* does not require administrative costs to be refunded to those who are not convicted.

The Court therefore finds that the plaintiffs' procedural due process claims are without merit.

G. Fourteenth Amendment Equal Protection Claim

Under the Equal Protection Clause of the Fourteenth Amendment, plaintiffs argue that the State lacks a compelling reason and even a rational basis for having different fees in different parishes. Since we are "not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness," the Court need apply only the rational basis test to plaintiffs' equal protection challenge. *Schilb,* 404 U.S. at 365, 92 S.Ct. at 484-85 (dismissing an equal protection attack on Illinois statute). The rational basis test is applied when neither a suspect classification nor a fundamental right is involved. *See Tigner v. Cockrell,* 2001 WL 987719, *4 (5th Cir. 2001). Under the test, the Court must uphold a governmental classification if it rationally promotes a legitimate governmental objective. *See id.*

In *Buckland,* the Third Circuit addressed the argument advanced by plaintiffs that because bail bond fees are applied at different rates in different counties, the bail bond statute is unconstitutionally vague. *See Buckland,*

812 F.2d at 148-49. (statute permitted counties to apply "reasonable fee"). The *Buckland* court dismissed the argument, stating that "the fact that a variation exists among the fees charged in different counties may simply reflect the range of experience and expense in those locations. The rule gives flexibility to the counties to meet local conditions." *Buckland,* 812 F.2d at 149. As the Third Circuit pointed out, "[t]he rule links the fee to the cost of administering the program, a measurement that has an ascertainable basis." *Id.* The Louisiana statutes are also linked to the administration of the bail bond system; they were levied for the "taking" and "filing and processing" of appearance bonds. *See* Section 1432(9). Further, the Louisiana bail law requires Sheriffs to provide appearance notices to those who post bail bonds. *See* LA. CODE CRIM. PROC. art 344. The fees make it possible for the Sheriffs to provide the required notices. Although the administrative needs of the parishes may vary, resulting in differences in the amounts collected, the fees are limited to a maximum of fifteen dollars per booking under Section 1432 and five dollars per booking under Section 1381(3). Further, they are linked to a legitimate government purpose of providing funds for the administration of the bail bond system, including the taking, filing and processing of bonds, and giving notices required by Louisiana law. *See Buckland,* 812 F.2d at 149. Therefore, the Court finds that the statutes are rationally related to legitimate governmental ends, and the plaintiffs' equal protection claims are without merit.

III. Conclusion

In sum, all of plaintiffs' claims are without merit. The Court hereby GRANTS summary judgment dismissing all of the plaintiffs' claims against the Sheriffs and the Clerk.

New Orleans, Louisiana, this 29th day of October, 2001.

/s/ Sarah Vance
SARAH S. VANCE
UNITED STATES DISTRICT
JUDGE

2001 WL 1456861 (E.D. Law)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL.

VERSUS

CITY OF NEW ORLEANS, ET AL.

CIVIL ACTION

NO: 00-2318

SECTION: "R" (2)

ORDER AND REASONS

(Filed Nov. 14, 2001)

Before the Court is the motion by the defendant, the City of New Orleans, to dismiss pursuant to Rule 12(b)(6). For the following reasons, the Court grants the motion.

Plaintiffs filed this civil rights action against the City of New Orleans and the Clerk of the Criminal District Court of Orleans Parish, in his official capacity. Plaintiffs challenge as unconstitutional a fee charged by the Clerk of the Criminal District Court for the Parish of Orleans for the filing and processing of appearance and witness bonds. The complaint alleges that this claim arises from an official policy of the State of Louisiana and is actionable under 42 U.S.C. § 1983. Plaintiffs allege that even though they were never convicted of a crime, the Clerk of the Criminal District Court of Orleans Parish added a five dollar filing and processing fee to the amount of their bonds, which was paid directly to the Clerk's office. The Court dismissed the claim against the Clerk on October 29, 2001 on the grounds that the challenged fee is not unconstitutional. The City of New Orleans moves to dismiss the claims against it under Rule 12(b)(6) of the

Federal Rules of Civil Procedure on the grounds that there is no basis for municipal liability in this case because the fee was not collected as a result of a policy or custom of the City of New Orleans. Because the Court has ruled that the fee is constitutional, there is no basis for liability against the City of New Orleans regardless of whether the fee was imposed by municipal policy or custom. Accordingly, the City's motion to dismiss is granted.

New Orleans, Louisiana, this 14th day of November, 2001.

/s/ Sarah Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL.	**CIVIL ACTION**
VERSUS	**NO: 00-2318C/W 00-30455, 00-3056, AND 00-3057**
PARISH OF ORLEANS, ET AL.	

JUDGMENT

(Filed Feb. 21, 2002)

Considering the Court's orders and reasons on file herein,

IT IS ORDERED, ADJUDGED, AND DECREED that plaintiff's complaints filed in Civil Action Nos. 00-3055, 00-3056, and 00-3057 are hereby **DISMISSED**.

New Orleans, Louisiana, this 20th day of February, 2002.

/s/ Sarah Vance
SARAH S. VANCE
UNITED STATES DISTRICT JUDGE

LSA-R.S. 13:1381. Fees

The following charges may be made for the services of the clerk of the criminal district court:

(1) For filing and recording affidavit, two dollars.

(2) For filing information or indictment, and for recording, docketing and indexing the same, for all, two dollars.

(3) For filing and processing of appearance or witness bond, five dollars.

(4) For orders to bring in prisoners into court and remanding same, one charge, one dollar.

(5) For issuing notice of arraignment, on principal and surety, for each original, with one copy, certified with seal, two dollars.

(6) For issuing notice of trial to principal and surety, for each original, with one copy, certified with seal, two dollars.

(7) For issuing notice of judgment on forfeiture of bonds on principal and surety for each original, with one copy, with certificates and seals, two dollars.

(8) For issuing subpoena to witnesses, one dollar and sixty cents.

(9) For issuing attachment against witness, four dollars.

(10) For issuing copy of indictment or information to be served on accused, as required by law, three dollars.

(11) For issuing copy of jury list, to be served on accused when required by law, two dollars.

(12) For issuing capias, two dollars.

(13) For issuing copy of sentence, with certificate and seal, two dollars.

(14) For each commitment, with seal, two dollars.

(15) For issuing each subpoena duces tecum, with one copy, with certificate and seal for both, three dollars; and for each additional copy, one dollar.

(16) For filing plea in abatement, special plea in bar, or plea to quash, each forty cents.

(17) For filing motion for new trial, or in arrest of judgment, and for issuing one copy thereof, with certificate and seal, for all, three dollars.

(18) For issuing writ of fieri facias, two dollars.

(19) For administering oaths, affixing jurat, certificate and seal, for all, one dollar.

Provided, that no charge shall be made for administering the oath to the affidavit of indigents hereinafter provided for.

(20) For making transcript of appeal, for each one hundred words, including certificate and seal thereto, sixty cents.

(21) For making copies of any paper, document or other proceeding, the original of which is in the custody of the clerk of the criminal district court including certificate and seal thereto, for each one hundred words, sixty cents.

(22) For filing a motion to suppress, three dollars.

(23) For filing a writ of habeas corpus, five dollars.

(24) For furnishing a copy of an indictment, two dollars.

(25) For making transcripts of appeal and all transcripts in nonindigent cases, including bills of exceptions, motions, writs, and all court proceedings, one dollar and fifty cents per thirty-one line page to be turned over to the official court reporter or deputy court reporter who prepared same.

(26) In all cases where a noncommercial surety bond is actually collected by the sheriff, the clerk shall be paid the sum of seven dollars and fifty cents by the sheriff out of the amount of the forfeited bond; however, the fee provided for in this Paragraph shall not be collected in addition to any fee collected pursuant to the provisions of R.S. 13:846(A)(1)(c) for noncommercial surety bonds actually collected by the sheriff.

LSA-R.S. 33:1432. Fees in criminal matters

The compensation, fees, and costs allowed sheriffs, the parish of Orleans excepted, for all services in criminal matters, shall be the following:

(1) For keeping and feeding of prisoners in jail not less than three dollars and fifty cents per diem for each prisoner. Any surplus funds remaining at the end of the fiscal year shall be returned to the parish governing authority.

(2) For executing any prisoner sentenced to capital punishment, fifty dollars to be paid by the parish.

(3) For every mile they actually and necessarily travel in going and returning from the service of any process outside the parish, a mileage rate equal to the mileage rate established by the Division of Administration for the use of state owned vehicles and all actual expenses incurred in the service of the process; and a mileage rate equal to the mileage rate established by the Division of Administration for the use of state owned vehicles for each mile actually traveled in recovering and conveying each fugitive from justice to the jail of the parish in which he is charged with having committed the offense, plus all actual expenses incurred in recovering and conveying the fugitive to the jail, provided the fugitive is charged with the commission of an offense which might be punishable with imprisonment in the state penitentiary. Where the fugitive is charged with a misdemeanor, the sheriff shall be reimbursed the actual expense incurred by him in recovering and conveying the fugitive to the parish jail. An explicit bill for each item of such expenses, with receipts therefore, if receipts can be obtained, including the fees and charges for making the arrest, must be made out. This bill shall be

paid by the parish upon the approval of the district judge or police jury.

(4) For transportation of prisoners to the penitentiary or other prison, for every mile which the sheriff or his deputies necessarily travel in going to and returning from, a mileage rate equal to the mileage rate established by the Division of Administration for the use of state owned vehicles. In addition, not more than two deputies shall be compensated at the rate of ten cents per mile for every mile which is necessarily traveled in going to such penitentiary or other prison; and for the expense of each prisoner conveyed, five cents per mile for going only, but not less than five dollars for each prisoner.

(5) No sum shall be paid for any service specified in the preceding paragraph unless the sheriff's account names the prisoner conveyed and is approved by the district judge or police jury.

(6) For conveying an insane person to the insane asylum, the same fees as above set forth for the conveyance of prisoners to the penitentiary or other prison, to be paid out of the parish treasury upon the order of the district judge or police jury, and all other expenses previously incurred in bringing the insane person before the district judge.

(7) For each warrant executed outside of the parish, two dollars.

(8) Sheriffs are entitled to receive the same fees as fixed in civil matters when a person is convicted and condemned to pay costs, which in no event shall be less than five dollars.

(9) For taking appearance bond when required to do so, fifteen dollars, unless suspended by a judge of the district court of the parish. A judge of a district court of the parish shall waive this fee if a defendant has been tried and found not guilty or if the charges against the defendant are dismissed.

LSA-R.S. 33:1520. Fees of criminal sheriff

The criminal sheriff of Orleans Parish shall collect from the parties, from witnesses, from sureties, and from sureties on bonds forfeited, the following fees and charges:

(1) For arresting any party under a capias or order of court issued on an information or indictment and bringing him into court, twelve dollars.

(2) For producing a party in court on the order of the judge when under confinement other than provided above, for each production, seven dollars.

(3) For serving notice of arraignment or of trial on accused and surety, for each, and return, seven dollars.

(4) For serving subpoena on each witness and return, seven dollars.

(5) For serving attachments to bring witnesses into court, to be paid by the witness in default, twelve dollars.

(6) For taking appearance bond or recognizance bond when required to do so, fifteen dollars, unless suspended by the judges of the Criminal District Court of the Parish of Orleans.

(7) For serving notice of judgment on forfeiture of bonds, seven dollars.

(8) For service of subpoena deuces tecum and for return, seven dollars.

(9) For executing writ of fieri facias either against the defendant or security on bond for costs on the amount of bond, twelve dollars.

(10) For mileage when traveling outside of the parish of Orleans, the same mileage as is allowed to the sheriffs of other parishes.

UNITED STATES OF AMERICA

State of [LOGO] **Louisiana**

Fox McKeithen

SECRETARY OF STATE

As Secretary of State, of the State of Louisiana, I do hereby Certify that the annexed and following pages contain a true and correct copy of Act No. 101 of the Regular Session of 1870 of the Louisiana Legislature as shown by comparison with the original on file in the archives of this office.

In testimony whereof, I have hereunto set my hand and caused the Seal of my Office to be affixed at the City of Baton Rouge on, this, the 4th day of February, 2002. [SEAL]

/s/ Fox McKeithen

Secretary of State

[No. 101.] AN ACT

To define and regulate the cost of the Clerks, Sheriffs, Recorders and Notaries Public throughout the State of Louisiana, and providing forfeitures and penalties for overcharging or failing to perform their duties, and the mode of collecting their fees.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the State of Louisiana, in General Assembly convened,* That the clerks of the district courts throughout the State shall be entitled to demand and receive the following fees of office, and no more; and they shall not be entitled to charge any other fees of office than those specially set forth therein, for any services as clerks which they may be required to render:

For indorsing, registering and filing petition, for all, ten cents.

For indorsing, registering and filing answer, for all, ten cents.

For issuing citation, with copy of same, with certificate and seal on each, fifty cents, one charge for both.

For issuing attachment, with copy of same, with certificates and seals on both, one dollar, one charge for both.

For issuing *fieri facias*, with seal, fifty cents.

For issuing writ of seizure and sale, with seal, one dollar.

For issuing writ of sequestration, with copy of same, with certificate and seals, one dollar, one charge for both

For issuing writ of *certiorari*, with copy of same, with certificates and seals, one dollar, one charge for both.

For issuing writ of injunction, with copy of same, with certificates and seals, for each party enjoined, one dollar, one charge for both.

For issuing writ of *habeas corpus* and copy, with certificate and seal, one dollar, to be charged in civil cases only. No charge to be made by either the clerk or sheriff in criminal cases.

For issuing writ of mandamus and copy of same, with certificates and seals, one dollar, one charge for both.

For issuing writ of distrangas and copy of same, with certificates and seal, one dollar, one charge for both.

For issuing subpena *duces tecum* and copy, with certificates and seal, one dollar, one charge for both.

For issuing subpena for witness and copy of same, with certificates and seal, twenty-five cents; when more copies than one may be issued, ten cents for each additional copy with certificate and seal.

For issuing writ of possession and copy of same, with certificates and seal, one dollar, one charge for both.

For each writ directing partition to be made, and copy of same with certificate and seal, fifty cents, one charge for both.

For issuing notice of judgment, and copy of same, with certificate and seal, twenty-five cents. For every continuance of a case from one term of court to a subsequent term, to be charged but once at each term, ten cents.

For issuing citation of appeal, and copy of same, with certificate and seal, fifty cents, one charge for both.

For issuing attachment to bring persons into court, or for contempt of court, and copy of the same, with certificates and seal, fifty cents, one charge for both.

For issuing *venire facias* in each case, in which a jury may be prayed for in the district court, to be charged but once in each case, twenty-five cents.

For swearing jury, twenty-five cents.

For swearing each witness, five cents.

For entering final judgment, no matter how many parties to the suit, to be charged but once in each case, fifty cents. For every order of court entered on the minutes

of the court, in any case, except herein otherwise provided for, regardless of the number of parties to the suit, fifteen cents.

For filing and registering returns on all writs or papers filed in a suit, five cents, except as herein otherwise provided.

For affixing certificate and seal of court to all other copies, records or documents other than those herein specified, twenty-five cents.

For notice to creditors of insolvents to attend meeting, and copies thereof, with certificates and seal, ten cents.

For taking and filing bond in all cases when required by law, fifty cents.

For registering and recording all deeds of conveyance of property sold by sheriffs, for each hundred words, ten cents, and twenty-five cents for the certificate of record, to be charged but once.

For entering satisfaction of judgment when required to do so in the original judgment, fifty cents.

For issuing commissions to take testimony of witnesses or answer to interrogatories, with certificate and seal, fifty cents.

For recording the petition, answer and judgment in each case, five cents for each one hundred words, and twenty-five cents for the certificate of record, with seal.

For every confession of judgment, when no papers are issued by the clerk, for all his services in such case, fifty cents, and no more shall be allowed, except for recording the petition, answer and judgment as hereinabove

provided. For issuing letters of appointment or confirmation of tutor, curator, administrator or executor, with copy of the same with certificates and seal, fifty cents, and for every additional copy thereof, with certificate and seal, twenty-five cents.

For issuing writ on decree or judgment, ordering or assessing estimates, fifty cents. For affixing certificate and seal to any act requiring one or both, twenty-five cents, not otherwise herein provided for. For taking down testimony in probating will and writing up the necessary orders and decrees, twenty-five cents for each hundred words.

For taking down testimony in all cases in court, ten cents for each hundred words. For recording probate proceedings, as required by law, five cents for each one hundred words.

For recording all proceedings required by law to be recorded by the clerk, not herein otherwise provided for, five cents for each hundred words.

For copies of all acts, required to be made out by the clerk, not otherwise provided for herein, ten cents for each hundred words, and twenty-five cents for the seal and certificate thereto.

For making record or transcript of appeals to the Supreme Court, ten cents for every hundred words, and twenty-five cents for the certificate and seal, and no more.

That the clerks of the district courts shall have authority to grant marriage license, and shall be entitled to a fee of two dollars, which shall include the bond license and recording the same with certificate of marriage.

Sect. 2. *Be it further enacted, etc.*, That the sheriffs throughout the State shall be entitled to demand and receive the following fees of office and no more, to wit:

For every conservatory writ issued in civil causes, two dollars, including the return of the writ.

For serving citation and petition on each defendant and return, two ($2) dollars; for serving subpena [sic] on each witness and return, fifty (50) cents; for keeping personal property under attachment, or otherwise legally in the hands of the sheriffs, to be fixed by the court after notice to the parties or their attorneys to the suit; for taking bond in all cases, civil or criminal, when by law the sheriff is required to take bond, one ($1) dollar.

For making an actual levee on property under an execution, and return of money made without sale, two ($2) dollars and mileage; for return of execution, no property found, one ($1) dollar and mileage; for levying executions or order of seizure and making sale, for the first five hundred dollars, two per cent; for each one hundred dollars, over the first five hundred to one thousand dollars, one per cent; for all sums after the first one thousand dollars, one-half of one per cent, provided that no per centage shall be allowed to the sheriff on any moneys made on such executions or order of seizure over and above the amount coming to the party causing the execution or order of seizure to issue; and in this case no allowance shall be made for the process verbal of sale or the return on the writ; for each conveyance of land sold under execution or order of seizure and sale, whether including one or more adjudications, two dollars; for serving summons for contempt and bringing the party into court, one dollar; for empanelling and calling petit jury in civil cases,

two dollars, and in criminal causes one dollar; for serving venire for petit jury, in civil causes only, to be charged but once in each case, and only in cases in which a jury is called, one dollar; and in criminal causes fifty cents shall be allowed for each summons to a juror; for serving a writ of *habeas corpus* and return, two dollars, in civil cases – no charge to be made in criminal cases; for notifying creditors of insolvent debtors to attend meetings, each twenty-five cents; for attendance in the Supreme Court, five dollars per day.

For attendance on the District and Parish Court, five dollars per day, to be paid on the warrant of the judges of such courts, out of the parish treasury, except in the parish of Orleans.

For keeping and maintaining prisoners in jail, per day sixty cents, and for receiving in and discharging from the parish prison, one dollar shall be allowed; the sheriff shall also be allowed the actual cost incurred for fuel, lights, necessary clothing for the prisoners and repairs to prison, upon the approval of the District Judge.

For executing any person sentenced to capital punishment, to be paid by the parish, fifty dollars.

For serving any order of court not otherwise provided for, fifty cents.

For advertising any sale made by the sheriff, when done in writing, and posting up the same, for each offering, ten cents for each hundred words, and twenty-five cents for posting them up.

The sheriffs, coroners and constables, the parish of Orleans excepted, shall be entitled to receive ten cents for every mile they may actually and necessarily travel, in

going to and returning from the service of any process, and in no case shall mileage be allowed for a greater distance than the place of residence of the person on whom the process was served, and when the return of such services is illegal or erroneous, no charge shall be made therefor.

The sheriffs shall be allowed a commission on all sums under five hundred dollars of two per cent, and one per cent, on all sums above five hundred dollars collected by them under a writ of *fieri facias*, or order of seizure or other writ, when made without a sale.

That the sheriffs throughout the State shall be entitled to demand for transportation of prisoners, for mileage, ten cents for each mile which they may necessarily travel, both in going and returning, and for the expense of each prisoner conveyed as aforesaid, he shall receive five cents per mile for going only.

That no sum shall be paid for any services as specified in the preceding paragraph, unless his account shall name the prisoners so conveyed, and when certified by the Judge as regards the distance, shall be paid on the warrant of the Judge of the court sentencing the prisoners.

That the distance for which sheriffs are to be paid is to be computed from the jail of the parish from which the prisoner was removed to the jail or penitentiary in the State to which the sheriff was ordered to conduct such prisoners, and where they did actually deliver them. When the prisoner is arrested in the parish and is conveyed to the jail of such parish, no mileage is to be charged.

SEC. 3. *Be it further enacted, etc.*, That the clerks and sheriffs are required to keep constantly posted up in their offices, copies of this fee bill, certified by the judge; and on

failure to comply with this section, they shall be subject to a fine of fifty dollars per week for the benefit of the parish, to be recovered by the policy jury before any court of competent jurisdiction.

SEC. 4. *Be it further enacted, etc.*, That the sheriffs throughout the State shall, whenever they return a paper or process of any kind into court or the clerk's office, endorse thereon the specified items of fees claimed by them that may have accrued on the process or paper, and in default thereof, or if such fees are overcharged, the same shall be forfeited and the sheriff forever be barred from collecting the item of fees so omitted or overcharged.

SEC. 5. *Be it further enacted, etc.*, That whenever a clerk or sheriff shall retire from office, he shall cause to be filed in the case and with the proceedings in which he may be entitled to costs, within thirty days, specific bills of their fees, and in default thereof, or if any item should be overcharged, the whole of the costs in the case in which the overcharge is made shall be forfeited, and such clerk or sheriff forever barred from collecting the same; and in the event of the death of the clerk or sheriff, his legal representative must have this requirement attended to on pain of the forfeiture herein stipulated, and he shall be responsible to the estate for any loss resulting from such neglect or forfeiture. That the cost of the clerk, sheriff, witnesses fees, cost of taking depositions and copies of acts used on the trial, and all other costs which the court may legally allow in any case shall be taxed as costs.

SEC. 6. *Be it further enacted, etc.*, That the clerks of the court shall endorse upon or annex to all writs of execution and orders of seizure issued by him, specific bills of cost.

SEC. 7. *Be it further enacted, etc.*, That before the clerk shall file any suit in the district court, the party applying to file such suit shall deposit with the clerk ten dollars, and before the clerk shall file any suit in the parish court, the party applying to file such suit shall deposit with the clerk five dollars, and the filing of the suit shall be evidence that such sum has been paid and deposited with the clerk, that such sums shall be held by the clerk to pay the costs of the clerk and sheriff in such cases, the clerk retaining one-half and the other half to be paid over to the sheriff, as fast as his fees accrue, until the amount to which he is entitled is exhausted, and the clerk shall be liable under his bond for the proper appropriation of of [sic] said amount.

That the clerks and sheriffs shall be entitled to collect the residue of their costs in every case, every six months, that is, all the costs due them on the first day of January of each year shall be considered on that day due and collectable, and all the costs due on the first day of July of each year shall be then due and collectable. That the costs shall be collected as follows: The clerk or sheriff shall make out a specific bill of their respective costs due and collectable, and shall swear to the correctness of the same, and that the same is due, and such cost bills shall be presented to the judge of the court in which the case was filed or is pending, who shall examine the same, and if he shall find them correct, he shall approve the same, and on which cost bill so approved the clerks shall issue execution against the principal and security for costs, and the same shall be collected by the sheriff, as on other executions, and the security for costs shall not be entitled to the plea of discussion. Execution shall not be issued in any such bill of costs until ten days after such bill of costs shall have

been demanded by the sheriff or his deputy, of the principal or security, which demand shall be made to appear by a return to that effect on said bill of costs, made and signed by the sheriff or his deputy; *Provided*, That in cases where there has been a written confession of judgment signed at or before the filing of the suit, the party filing the same shall not be required to deposit more than the costs for the confession of judgment and recording proceedings as is provided for by this act; *And provided further* that if, at or before the time of filing the suit, there has been written waiver of service of citation and petition, the party filing the suit shall be required to deposit only five dollars, if in the district court, and two dollars and fifty cents if in the parish court, to be disposed of as required in the first part of this section; *And provided further*, That if any part of the money so deposited remains after paying the taxed costs of suit, accrued at the date of rendering the final judgment in the case, the same shall be returned to the party originally depositing it.

SEC. 8. *Be it further enacted, etc.*, That it shall be the duty of the clerk of the court to take good security for the cost in every case where the costs are not paid in advance, before filing the suit.

SEC. 9. *Be it further enacted, etc.*, That no person shall be bound to pay any costs or fees until the officer claiming the same shall deliver to the person against whom the fees may be charged, an explicit fee bill, stating in detail the separate items of such fees, signed with the officer's name in full officially, and on payment the officer shall be bound to give a receipt on said fee bill, if so required; that the amount required to be deposited on filing the suit, by the provisions of this act, shall be credited by the clerk and sheriff on their bills of costs in the

case, and for the overplus, if any, execution shall issue when it becomes necessary to issue execution therefor.

SEC. 10. *Be it further enacted, etc.*, That the recorders and notaries public shall be entitled to demand and receive at the time the services may be performed, the following fees of office, and no more, and that they shall not be entitled to charge for any other service they may perform or be required to perform as recorders and notaries public: For writing original acts of any kind, including recording the same, per hundred words, twenty cents. When an act notary in form is written out by some other party and passed before the recorder or notary public as a notarial act, the fees shall be twenty-five cents for passing the act, and ten cents for every hundred words for recording the same; for every necessary certificate and seal every notarial act, twenty-five cents; and no notarial act shall have more than one certificate and seal; for making copies of all official documents, ten cents for every hundred words; for certificate and seal to every copy, twenty-five cents; for proving up an act under private signature, twenty-five cents; for recording an act under private signature, ten cents for every hundred words, and twenty-five cents for the certificate and seal showing the recording thereon for certificates of mortgages, with seal, one dollar, and for every hundred words after the first four hundred, twenty cents; for canceling mortgages, with certificate and seal thereof, one dollar; the parties [illegible] the notarial act may, by written clause in the act dispense with the certificate of mortgage required by article three thousand three hundred and twenty-eight of the Civil Code, and, in such cases, the recorder or notary public shall not be entitled to charge for such certificate for fixing seals on effects of deceased persons, two dollars; for swearing each

appraiser or expert, twenty-five cents; for recording acts passed before other notaries public, ten cents for every hundred words, and twenty-five cents for the certificate and seal, provided there is not over one certificate and seal; for making inventories of successions or other property out of office, fifty cents per hour, provided not more than twelve hours per day shall be charged, together with twenty cents per hundred words for the process verbal of the inventory, and recording it, and twenty-five cents for the certificate and seal thereon; for making inventories in office there shall only be charged twenty cents for every hundred words for taking and recording the same, and twenty-five cents for the certificate and seal; for making partitions, twenty cents for every hundred words including recording the same, and twenty-five cents for the certificate and seal.

SEC. 11. *Be it further enacted, etc.*, That it shall be the duty of the recorder or the notary public, if required by the person having the services performed, as described in the foregoing section of this act, to give a detailed fee bill, receipted, to such person, on his paying the fees for all services performed, which shall be evidence of payment.

SEC. 12. *Be it further enacted, etc.*, That if any clerk, sheriff, recorder or notary public in the State shall presume to demand and collect any other or greater fees than are particularly and specially herein set forth, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, his office, from the date of conviction, shall be deemed vacant, *ipso facto*, and be filled as provided by law for filling vacancies in such offices; and he shall be decreed, in addition, to refund any amount he may have collected in excess of his legal fees, and be further fined in the sum of not less than fifty nor more than one hundred

dollars for each overcharge, at the discretion of the court, for the use of the parish. This fine may be sued for by the police jury of the parish, or any person aggrieved, for the use of the parish, independent of the prosecution for misdemeanor, in any court having jurisdiction; but the fine shall not be assessed but once in each case, and the civil suit shall not bar the criminal proceeding provided for in this section.

SEC. 13. *Be it further enacted, etc.*, That all laws or parts of laws in conflict with or contrary to the provisions of this act, be and the same are hereby repealed.

SEC. 14. *Be it further enacted, etc.*, That this act shall take effect from and after the date of its passage.

(Signed) MORTIMER CARR,
Speaker of the House of Representatives.
(Signed) OSCAR J. DUNN,
Lieutenant Governor and President of the Senate.

A true copy:
GEO. E. BOVEE, Secretary of State.

NOTE BY THE SECRETARY OF STATE.– The foregoing act, having been presented to the Governor of the State of Louisiana for his approval, and not having been returned by him to the house of the General Assembly, in which it originated, within the time prescribed by the constitution of the State of Louisiana, has become law without his approval.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL VS. PARISH OF ORLEANS, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057 This pleading applicable to No. 00-3056, 00-3055, 00-3057. Sec "R" Mag. (2), Joseph C. Wilkerson, Jr. Honorable Sarah S. Vance, U.S. District Judge, Presiding Civil Rights Action (42 USC § 1983)

List of Trial Stipulations

(Filed Aug. 20, 2001)

Seven sets of trial stipulations were executed by counsel for plaintiffs and defendants. Inadvertently, four sets have the same title: "Trial Stipulations by Sheriff-Defendants." In order to minimize confusion, below is a list of the seven sets of stipulations with an annotation of the difference in the four with the same title. A copy of each set with an annotation added to this title is attached for clarity.

1) Trial Stipulations by Fifty-Two Sheriff-Defendants

2) Trial Stipulations by Sheriff Foti

3) Trial Stipulations by Clerk of Criminal District Court

4) Trial Stipulations by Sheriff-Defendants
(by Julia E. Blewer for Sheriffs of Bossier, Caddo, and Red River Parishes)

5) Trial Stipulations by Sheriff-Defendants
(by Don Almerico for Sheriff of St. John the Baptist Parish)

6) Trial Stipulations by Sheriff-Defendants
(by John H. Musser, IV for Sheriff of St. Charles Parish)

7) Trial Stipulations by Sheriff-Defendants
(by Leu Anne Lester Greco for Sheriff of East Baton Rouge Parish)

Respectfully submitted:

/s/ Jack Dveirin
Jack Dveirin (LSBA #14968)
Counsel for Plaintiffs
7925 Willow Street
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CERTIFICATE

I certify that a copy of the foregoing was served on all counsel of record and interested parties proceedings by fax or by depositing same in the U.S. Mail properly addressed and postage prepaid on August 20, 2001.

/s/ Jack Dveirin
Jack Dveirin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057
VS.	This pleading applicable to No. 00-3055, 00-3056, 00-3057.
PARISH OF ORLEANS, ET AL	Sec "R" Mag. (2), Judge Vance, Mag Wilkerson

Trial Stipulations by Fifty-Two Sheriff-Defendants

(Filed Aug. 17, 2001)

Stipulation #1. All class representatives/plaintiffs are of the full age of majority.

Stipulation #2. All defendants represented by undersigned counsel were acting in their official capacities, under color of state law, at all times concerning the allegations in the complaint.

Stipulation #3. Defendants represented by undersigned counsel applied LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055).

Stipulation #4. Some defendants represented by undersigned counsel apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay $15.00 *per arrestee* prior to pretrial release from jail on bail.

Stipulation #5. Other defendants represented by undersigned counsel apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by

requiring arrestees to pay $15.00 *per booking* prior to pretrial release from jail on bail.

Stipulation #6. Sheriff or Jefferson Parish applies LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay *or promise to pay* $15.00 prior to pretrial release from jail on bail.

Stipulation #7. Intentionally omitted.

Stipulation #8. The Sheriffs of Avoyelles, Livingston, St. James, and Lafayette Parishes never applied LSA-R.S. 33 § 1432(9) either by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail. Sheriff of Cameron Parish stopped applying LSA-R.S. 33 § 1432(9) either by requiring arrestees to pay or promise to pay $15.00 prior to trial release from jail on bail after the filing of the complaint and tendered fees collected since one year before filing of the complaint into the registry of the court.

Stipulation #9. The documents pertaining to plaintiffs that are scanned into, incorporated into, or attached to the complaint in Dazet v. Foster (00-3055) are authentic.

Stipulation #10. The documents in the Appendix to "Plaintiffs' Trial Brief and Opposition to Defendants' Motions to Dismiss" are authentic.

Stipulation #11. Personal jurisdiction, subject matter jurisdiction, standing, and venue are not contested issues.

Stipulation #12. Sheriff deputies and police officers making arrests have initial discretion over the nature and number of charges upon which an arrestee is to be booked.

Stipulation #13. The usual practice is for the defendants represented by undersigned counsel in Dazet v. Foster (00-3055) to retain the $15.00 paid by the plaintiffs after the charges are dismissed or dropped. this stipulation neither admits nor denies that an arrestee who requests a refund actually receives that refund. The evidence available is that only three Sheriffs represented by undersigned counsel (St. Martin-1, Vernon-37, Washington-2) have made refunds.

Stipulation #14. Some defendants in Dazet v. Foster (00-3055) have a line item in their budgets called "bond Processing Fees."

Stipulation #15. Intentionally omitted.

Stipulation #16. No defendant in Dazet v. Foster (00-3055) requires payment of $14.00 for two notices at $7.00 each from arrestees prior to pretrial release from jail on bail similar to what Sheriff Foti does in Perkins v. Foster (00-3056).

Respectfully submitted,

USRY, WEEKS, & MATTHEWS

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John F. Weeks, II
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/s/ Jack Dveirin
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Samuel S. Dalton
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(504) 835-4289

CERTIFICATE

I certify that a copy of the foregoing motion was served on all counsel of record and interested parties in these proceedings by fax or by depositing same in the U.S. Mail properly addressed and postage prepaid on August 17, 2001.

/s/ Jack Dveirin
Jack Dveirin

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057
VS.	This pleading applicable to No. 00-3056, 00-3055, 00-3057.
PARISH OF ORLEANS, ET AL	Sec "R" Mag. (2), Judge Vance, Mag Wilkerson

Trial Stipulations by Sheriff Foti

Stipulation #1. All class representatives/plaintiffs are of the full age of majority.

Stipulation #2. Sheriff Foti was acting in his official capacity, under color of state law, at all times concerning the allegations in the complaint.

Stipulation #3. Sheriff Foti applied LSA-R.S. 33 § 1520(3) and (6) to plaintiffs in the Class certified in *Perkins v. Foster* (00-3056).

Stipulation #4. The ordinary manner in which Sheriff Foti applied LSA-R.S. 33 § 1520(3) and (6) to plaintiffs in the Class certified in *Perkins v. Foster* (00-3056) is for arrestees to pay $15.00 or a multiple of $15.00 based on the number of bookings or bonds plus $14.00 (for 2 notices at $7.00 each) prior to pretrial release from jail on bail.

Stipulation #5. The documents pertaining to plaintiffs that are scanned into, incorporated i [sic], or attached to the complaint in *Perkins v. Foster* (00-3056) are authentic.

Stipulation #6. The documents in the Appendix to Plaintiffs' Trial Brief and Opposition to Defendants' Motions to Dismiss are authentic.

Stipulation #7. Personal jurisdiction, subject matter jurisdiction, standing, and venue are not contested issues.

Stipulation #8. Sheriff deputies and police officers making arrests have initial discretion over the nature and number of charges upon which an arrestee is to be booked.

Stipulation #9. The usual practice is for Sheriff Foti ~~in *Perkins v. Foster* (00-3056)~~ to retain fees collected under LSA-R.S. 33 § 1520(3) and (6) prior to release from jail on bail after the charges are dismissed or dropped. This stipulation neither admits nor denies that an arrestee who requests a refund actually receives that refund.

Stipulation #10. Sheriff Foti has a line item in his budget called "Release processing fees."

Respectfully submitted,

USRY, WEEKS, & MATTHEWS

/s/ John F. Weeks, II
John F. Weeks, II
(13309)
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CERTIFICATE

I certify that a copy of the foregoing motion was served on all counsel of record and interested parties in these proceedings by fax or by depositing same in the U.S. Mail properly addressed and postage prepaid on August 17, 2001.

/s/ Jack Dveirin
Jack Dveirin

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL VS. PARISH OF ORLEANS, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057 This pleading applicable to No. 00-3057. Sec "R" Mag. (2), Joseph C. Wilkerson, Jr. Honorable Sarah S. Vance, U.S. District Judge, Presiding Civil Rights Action (42 USC § 1983)

Trial Stipulations by Clerk of Criminal District Court

(Filed Aug. 17, 2001)

Stipulation #1. All class representatives/plaintiffs are of the full age of majority.

Stipulation #2. Defendant was acting in his official capacity, under color of state law, at all times concerning the allegations in the complaint.

Stipulation #3. Defendant applied LSA-R.S. 13 § 1381(3) to plaintiffs in the Class certified in Perkins v. Foster (00-3057).

Stipulation #4. The ordinary manner in which defendant applied LSA-R.S. 13 § 1381(3) to plaintiffs in the Class certified in Perkins v. Foster (00-3057) is for arrestees to pay $5.00 prior to pretrial release from jail on bail.

Stipulation #5. The documents pertaining to plaintiffs that are scanned into the complaint in Perkins v. Foster (00-3057) are authentic.

Stipulation #6. The documents in the Appendix to "Plaintiffs' Trial Brief and Opposition to Defendants' Motions to Dismiss" are authentic.

Stipulation #7. Personal jurisdiction, subject matter jurisdiction, standing, and venue are not contested issues.

Stipulation #8. The usual practice is for the Clerk of Criminal District Court-defendant in Perkins v. Foster (00-3057) to retain $5.00 paid by the plaintiffs after the charges are dismissed or dropped.

Stipulation #9. The Clerk of Criminal District Court is the only Clerk of Court in Louisiana who requires arrestees to pay $5.00 prior to pretrial release from jail on bail.

Respectfully submitted,

/s/ Millard D. Collins
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1775
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CERTIFICATE

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/s/ Jack Dveirin
Jack Dveirin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL VS. PARISH OF ORLEANS, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057 This pleading applicable to No. 00-3055 & 00-3066. Sec "R" Mag. (2), Joseph C. Wilkerson, Jr. Honorable Sarah S. Vance, U.S. District Judge, Presiding Civil Rights action (42 USC § 1983)

Trial Stipulations by Sheriff-Defendants

(Filed Aug. 17, 2001)

Stipulation #1. All class representatives/plaintiffs are of the full age of majority

Stipulation #2. All defendants were acting in their official capacities, under color of state law, at all times concerning the allegations in the complaint.

Stipulation #3. Defendants represented by undersigned counsel applied LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055).

Stipulation #4. The ordinary manner in which defendants represented by undersigned counsel apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) is for arrestees to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #5. Some defendants apply LSA-R.S. 33 § 1432 (9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay $15.00 per booking prior to pretrial release from jail on bail.

Stipulation #6. Some defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #7. Some defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay or promise to pay $15.00 per booking prior to pretrial release from jail on bail.

Stipulation #8. The Sheriffs of Avoyelles, Livingston, St. James, and Lafayette Parishes do not apply LSA-R.S. 33 § 1432(9) by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #9. The documents pertaining to plaintiffs that are scanned into the complaint in Dazet v. Foster (00-3055) are authentic.

Stipulation #10. The documents in the Appendix to "Plaintiffs' Trial Brief and Opposition to Defendants' Motions to Dismiss" are authentic.

Stipulation #11. Personal jurisdiction, subject matter jurisdiction, standing, and venue are not contested issues.

Stipulation #12. The arresting officer, either a Sheriff's deputy or police officer, has discretion over the number of bookings.

Stipulation #13. The usual practice is for the defendants represented by undersigned counsel in Dazet v. Foster (00-3055) to retain the $15.00 paid by the plaintiffs after the charges are dismissed or dropped.

Stipulation #14. Some defendants in Dazet v. Foster (00-3055) have a line item in their budgets called "Bond Processing Fees."

Stipulation #15. Intentionally omitted.

Stipulation #16. No defendant represented by undersigned counsel in Dazet v. Foster (00-3055) requires payment of $14.00 for two notices at $7.00 each from arrestees prior to pretrial release from jail on bail.

Respectfully submitted,

COOK, YANCEY, KING & GALLLOWAY

s/ Julia E. Blewer
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Samuel S. Dalton (LSBA#4473)
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Jefferson, LA 70181-0501
(504) 835-4289

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I certify that a copy of the foregoing motion was served on all counsel of record and interested parties in these proceedings by fax or by depositing same in the U.S.

Mail properly addressed and postage prepaid on August 17, 2001.

/s/ Jack Dveirin
Jack Dveirin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL VS. PARISH OF ORLEANS, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057 This pleading applicable to No. 00-3055. Sec "R" Mag. (2), Joseph C. Wilkerson, Jr. Honorable Sarah S. Vance, U.S. District Judge, Presiding Civil Rights action (42 USC § 1983)

Trial Stipulations by Sheriff-Defendants

(Filed Aug. 17, 2001)

Stipulation #1. All class representatives/plaintiffs are of the full age of majority

Stipulation #2. All defendants were acting in their official capacities, under color of state law, at all times concerning the allegations in the complaint.

Stipulation #3. Defendants applied LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055).

Stipulation #4. The ordinary manner in which defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) is for arrestees to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #5. Some defendants apply LSA-R.S. 33 § 1432((9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay $15.00 per booking prior to pretrial release from jail on bail.

Stipulation #6. Some defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #7. Some defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay or promise to pay $15.00 per booking prior to pretrial release from jail on bail.

Stipulation #8. The Sheriffs of Avoyelles, Livingston, St. James, and Lafayette Parishes do not apply LSA-R.S. 33 § 1432(9) by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #9. The documents pertaining to plaintiffs that are scanned into the complaint in Dazet v. Foster (00-3055) are authentic.

Stipulation #10. The documents in the Appendix to "Plaintiffs' Trial Brief and Opposition to Defendants' Motions to Dismiss" are authentic.

Stipulation #11. Personal jurisdiction, subject matter jurisdiction, standing, and venue are not contested issues.

Stipulation #12. Sheriff deputies have discretion over the number of bookings.

Stipulation #13. The usual practice is for the defendants in Dazet v. Foster (00-3055) to retain the $15.00 paid by the plaintiffs after the charges are dismissed or dropped.

Stipulation #14. Some defendants in Dazet v. Foster (00-3055) have a line item in their budgets called "Bond Processing Fees."

Stipulation #15. No defendant in Dazet v. Foster (00-3055) has a line item in their budget for refunds of "Bond Processing Fees."

Stipulation #16. No defendant in Dazet v. Foster (00-3055) requires payment of $14.00 for two notices at $7.00 each from arrestees prior to pretrial release from jail on bail.

Respectfully submitted,

/s/ D.A.
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CERTIFICATE

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Mail properly addressed and postage prepaid on August 17, 2001.

/s/ Jack Dveirin
Jack Dveirin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL VS. PARISH OF ORLEANS, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057 This pleading applicable to No. 00-3055. Sec "R" Mag. (2), Joseph C. Wilkerson, Jr. Honorable Sarah S. Vance, U.S. District Judge, Presiding Civil Rights Action (42 USC § 1983)

Trial Stipulations by Sheriff-Defendants

(Filed Aug. 17, 2001)

Stipulation #1. All class representatives/plaintiffs are of the full age of majority

Stipulation #2. All defendants were acting in their official capacities, under color of state law, at all times concerning the allegations in the complaint.

Stipulation #3. Defendants applied LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055).

Stipulation #4. The ordinary manner in which defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) is for arrestees to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #5. Some defendants apply LSA-R.S. 33 § 1432((9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay $15.00 per booking prior to pretrial release from jail on bail.

Stipulation #6. Some defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #7. Some defendants apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay or promise to pay $15.00 per booking prior to pretrial release from jail on bail.

Stipulation #8. The Sheriffs of Avoyelles, Livingston, St. James, and Lafayette Parishes do not apply LSA-R.S. 33 § 1432(9) by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #9. The documents pertaining to plaintiffs that are scanned into the complaint in Dazet v. Foster (00-3055) are authentic.

Stipulation #10. The documents in the Appendix to "Plaintiffs' Trial Brief and Opposition to Defendants' Motions to Dismiss" are authentic.

Stipulation #11. Personal jurisdiction, subject matter jurisdiction, standing, and venue are not contested issues.

Stipulation #12. Sheriff deputies have discretion over the number of bookings.

Stipulation #13. The usual practice is for the defendants in Dazet v. Foster (00-3055) to retain the $15.00 paid by the plaintiffs after the charges are dismissed or dropped.

Stipulation #14. Some defendants in Dazet v. Foster (00-3055) have a line item in their budgets called "Bond Processing Fees."

Stipulation #15. No defendant in Dazet v. Foster (00-3055) has a line item in their budget for refunds of "Bond Processing Fees."

Stipulation #16. No defendant in Dazet v. Foster (00-3055) requires payment of $14.00 for two notices at $7.00 each from arrestees prior to pretrial release from jail on bail.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing motion was served on all counsel of record and interested parties in these proceedings by fax or by depositing same in the U.S.

Mail properly addressed and postage prepaid on August 17, 2001.

/s/ Jack Dveirin
Jack Dveirin

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KAYNE BROUSSARD, ET AL VS. PARISH OF ORLEANS, ET AL	No. 00-2318 C/W 00-3055, 00-3056 & 00-3057 This pleading applicable to No. 00-3055. Sec "R" Mag. (2), Joseph C. Wilkerson, Jr. Honorable Sarah S. Vance, U.S. District Judge, Presiding Civil Rights Action (42 USC § 1983)

Trial Stipulations by Sheriff-Defendants

(Filed Aug. 17, 2001)

Stipulation #1. All class representatives/plaintiffs are of the full age of majority.

Stipulation #2. All defendants were acting in their official capacities, under color of state law, at all times concerning the allegations in the complaint.

Stipulation #3. Defendants applied LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055)

Stipulation #4. Sheriff Litchfield applies LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by requiring arrestees to pay $15.00 prior to pretrial release from jail on bail unless waived by the Court.

Stipulation #5. Intentionally ~~Admitted~~ Omitted [/s/ LAG JD].

Stipulation #6. Sheriff Litchfield does not apply LSA-R.S. 33 § 1432(9) to plaintiffs in the Class certified in Dazet v. Foster (00-3055) by accepting a promise to pay $15.00 prior to pretrial release from jail on bail in lieu of payment of $15.00.

Stipulation #7. Intentionally ~~Admitted~~ Omitted [/s/ LAG JD].

Stipulation #8. The Sheriffs of Avoyelles, Livingston, St. James, and Lafayette Parishes do not apply LSA-R.S. 33 § 1432(9) by requiring arrestees to pay or promise to pay $15.00 prior to pretrial release from jail on bail.

Stipulation #9. The documents pertaining to plaintiffs that are scanned into, incorporated into, or attached to the complaint in Dazet v. Foster (00-3055) are authentic.

Stipulation #10. The documents in the Appendix to "Plaintiffs' Trial Brief and Opposition to Defendants' Motions to Dismiss" are authentic.

Stipulation #11. Personal jurisdiction, subject matter jurisdiction, standing, and venue are not contested issues.

Stipulation #12. Sheriff deputies and police officers making arrests have discretion over the nature and number of charges upon which an arrestee is to be booked.

Stipulation #13. Sheriff Litchfield in Dazet v. Foster (00-3055) has not refunded any of the $15.00 paid by the plaintiffs prior to release from jail on bail after the charges are dismissed or dropped. This stipulation neither admits nor denies that an arrestee who requests a refund would receive that refund.

Stipulation #14. Some defendants in Dazet v. Foster (00-3055) have a line item in their budgets called "Bond Processing Fees."

Stipulation #15. Intentionally omitted.

Stipulation #16. Sheriff Litchfield in Dazet v. Foster (00-3055) does not require payment of $14.00 for two notices at $7.00 each from arrestees prior to pretrial release from jail on bail.

Respectfully submitted,

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CERTIFICATE

I certify that a copy of the foregoing motion was served on all counsel of record and interested parties in these proceedings by fax or by depositing same in the U.S. Mail properly addressed and postage prepaid on August 17, 2001.

/s/ Jack Dveirin
Jack Dveirin

EXHIBIT D

OFFICE OF THE CLERK OF COURT
Parish of Orleans – Criminal District Court
2700 Tulane Avenue –Room 104

CASH RECEIPT OF $5 BOND
PROCESSING FEE No 024300

Receipt

☐ Magistrate No. : 373499

☐ Cash Bond ☐ Other _____

Defendant Name: Denico Perkins

Payor Name: [Illegible]

No of Bonds: _____ Total Paid: 5.00

Date: Aug. 11, 2000 Received By: [illegible]

Original – Payor

EXHIBIT D

ORLEANS PARISH CRIMINAL SHERIFF
RELEASE PROCESSING FEE

#207423

DATE 8/11/2000

RECEIVED FROM B.B.B.

REPRESENTING B.B.B.

THE SUM OF $29.00

FOR THE RELEASE OF Demico Perkins

ON THE CHARGE(S) OF: 40-966(A)1

ARREST #1810326

_____ CASE #373499

_____

___ NO CHARGE (INDIGENT) BY [Illegible]

_____

No. 02-1458

Supreme Court, U.S.
FILED
MAY 2 2003
CLERK

In The

Supreme Court of the United States

LEONARD J. DAZET, JR., JAMES ANTHONY McDANIEL, DEMICO PERKINS, and all those similarly situated,

Petitioners,

v.

M. J. FOSTER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

JOHN F. WEEKS, II
Counsel of Record
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Counsel for Fifty-Two (52) Sheriff Respondents Identified on Pg. (i) Herein

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

RESPONDENTS IN THIS BRIEF

The following Sheriffs in Louisiana (name of Parish in parentheses): Kenneth Goss (Acadia), Hal Turner (Allen), Jeff Wiley (Ascension), M. Bolivar Bishop (Beauregard), James R. Savoie (Cameron), Ronnie Book (Catahoula), Kenneth L. Volentine (Claiborne), Randy Maxwell (Concordia), Rodney Arbuckle (De Soto), Mark W. Shumate (East Carroll), Wayne Morein (Evangeline), Steve Pylant (Franklin), Leonard Hataway (Grant), Sidney Hebert (Iberia), Harry Lee (Jefferson), Richard Edwards, Jr. (Jefferson Davis), Craig Webre (Lafourche), Carol Smith (La Salle), Wayne Houck (Lincoln Parish), Larry Cox (Madison), Danny McGrew (Morehouse), Victor Jones (Natchitoches), Charles C. Foti, Jr. (Orleans), I. F. Hingle (Plaquemines), Paul Raymond Smith (Pointe Coupee), William Earl Hilton (Rapides), Charles McDonald (Richland), Guffey L. Pattison (Sabine), Jack A. Stephens (St. Bernard), Ronald Ficklin (St. Helena), Wayne L. Jones (St. John the Baptist), Howard Zerangue (St. Landry), Charles Fuselier (St. Martin), David A. Naquin (St. Mary), Rodney Strain (St. Tammany), Edward Layrisson (Tangipahoa), Ricky Jones (Tensas), Jerry J. Larpenter (Terrebonne), Bob Buckley (Union), Ray Lemaire (Vermillion), Duane Blair (Washington), Larkin Riser (Webster), Randall J. Andre (West Baton Rouge), Gary K. Bennett (West Carroll), Austin Daniel (West Feliciana), James E. Jordan (Winn), Mike Waguespack (Assumption), John E. Ballance (Bienville), Beth O. Lundy (Calcasieu), Steven E. May (Caldwell), Talmadge Bunch (East Feliciana), Brent Allain (Iberville), Richard Johnson (Jackson), Richard E. Fewell, Sr. (Ouachita), Sam Craft (Vernon)

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STATEMENT OF THE CASE

Petitioners' summaries of the three bail bond release statutes at issue and of the procedural history of these consolidated class actions are substantially correct and require no elaboration. However, their recitation of the material facts which became the basis for summary judgment is misleading by omission.

The factual record in this case is composed of stipulations concerning each defendant's procedures in enforcing the relevant fee statute under which it operates. These six stipulations are found in the Appendix to the Petition at pp. A-83 through A-107.[1] Despite the enormous number of potential claimants,[2] the record is devoid of any evidence that:

a) any arrestee was prevented from (or even delayed in) securing release on bond by collection of the fee;

b) any arrestee who was acquitted or whose charges were dismissed ever made request for return of his fee, much less was refused it; or

c) any sheriff ever applied the release fee statute otherwise than uniformly to all categories of arrestees in his Parish.

---

[1] The Appendix to the Petition is cited herein as "App. ___". The Petition itself is cited as "Pet. ___".

[2] Petitioners assert that "perhaps hundreds of thousands of fees" have been collected from class members (Pet. at 6).

Although these stipulations also show that different sheriffs interpret and apply the statutes differently, all that evidence proves is that a number of sheriffs are not collecting the entire amount to which they are statutorily entitled (*i.e.*, one fee per bond per charge).

Throughout their Brief, petitioners consistently refer to the bail bond release fees as "court costs". While it is true that the statutory authority for collection of these fees is found in statutes which also provide for collection of a variety of other charges, the fees are (as recognized by both courts below) nominal administrative charges related to the operation of the bail bond system. The name given to the fees is of no constitutional significance; the charges are what they are. To conclude otherwise would lead to the bizarre result that a legislature could redeem an unconstitutional statute simply by renaming or relocating it.

REASONS FOR DENYING THE WRIT

For their writ grant considerations, petitioners urge that the Fifth Circuit "misstated" the rule of an opinion of this Court and that its opinion actually "conflicts" with a decision of the Louisiana Supreme Court. (Pet. at 8).[3] The first contention is simply wrong; the second contention, even if arguably correct, is not a sufficient basis for this Court to exercise its discretionary jurisdiction. The skimpy record in this case is a poor foundation upon which to expect this Court to address issues of significant legal, fiscal and political import concerning the powers of the

[3] No conflicting opinion of any other circuit is suggested.

various states to provide for the funding and operation of their criminal justice systems.

I. The fees at issue are not "court costs" but reasonable administrative charges which implicate no constitutional protection.

Petitioners' argument that the release fees at issue constitute prohibited "court costs" has already been rejected twice, and rightly so. The Fifth Circuit concluded they were instead only constitutionally permissible "administrative charges related to the functioning of the bail-bond system. . . . " 318 F.3d at 647.

In so holding, the Fifth Circuit reaffirmed its prior opinion in *Enlow v. Tishomingo County, Mississippi*, 45 F.3d 885 (5th Cir. 1995), which dismissed similar challenges to a practically identical Mississippi statute. In turn, both its opinion herein and its opinion in *Enlow* relied upon the decision of this Court in *Schilb v. Kuebel*, 404 U.S. 357 (1975).

Schilb is not factually on all fours with the present controversy, but its reasoning supports the validity of the challenged statutes. *Schilb* questioned an Illinois law which provided for a nominal non-refundable fee for participation in a new, court-administered bond release program. Rejecting claims of constitutional invalidity under both the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment, this Court held:

> But we are not at all concerned here with any fundamental right to bail or with any Eighth Amendment-Fourteenth Amendment question of bail excessiveness. Our concern, instead, is with

> the 1% cost-retention provision. This smacks of administrative detail and of procedure and is hardly to be classified as a 'fundamental' right or as based upon any suspect criterion. The applicable measure, therefore, must be the traditional one: Is the distinction drawn by the statutes invidious and without rational basis.
>
> 404 U.S. at 365 (citations omitted).

Distinguishing its own prior opinion in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), the *Schilb* Court also concluded that the non-refundable fee at issue was neither a court cost nor a cost of prosecution. 404 U.S. at 370.

II. The fees at issue do not impinge on any fundamental right, "limited" or otherwise.

As shown above, this Court has already decided in *Schilb* that imposition of a non-refundable charge for accepting bail does not impinge on a fundamental right guaranteed by any specific provision of the Constitution. Thus, the validity of such a charge must be evaluated only through the Due Process Clause of the Fourteenth Amendment. *Bell v. Wolfish*, 441 U.S. 520, 533 (1979).

Bell specifically rejected a compelling necessity standard to justify governmental action. 441 U.S. at 534. Rather, it held that governmental action would pass constitutional scrutiny if the conduct was reasonably related to a legitimate governmental objective. *Id.* at 538-39. The reasonable governmental objective of the nominal fees at issue here is obvious: to defray the costs of

operating the bail bond system in which petitioners participated.[4] The charges are modest on their face, and the record is devoid of any evidence that they represent a windfall to their recipients.

III. The Louisiana Supreme Court's sole opinion concerning the statutes at issue neither requires nor merits acceptance by a federal court deciding a federal question.

Petitioners seem to believe that the courts below declined to adopt the opinion of the Louisiana Supreme Court in *State ex rel. Leche v. Waggner*, 8 So. 209 (1890) as the controlling rule of decision simply because it is an old case. *Waggner* is certainly old, but that is not the point; *Marbury v. Madison*, 5 U.S. 137 (1803) is considerably older.

There are several fundamental problems with petitioners' reliance on *Waggner*. First, although *Waggner* (which involved removal of a sheriff from office on numerous asserted grounds of malfeasance) stated that collection of a statutorily mandated bail bond release fee was the equivalent of extortion, the opinion never states whether this conclusion is grounded in Louisiana statutory law, in the Louisiana Constitution or in the United States Constitution.[5] No subsequent opinion of any Louisiana court

---

[4] It is worthwhile to note that Illinois, the birthplace of "bail reform" law, now exacts a fee akin to the statutes challenged herein. In at least one county, that fee is $15.00. *See Taylor v. County of Peoria*, 727 N.E. 2d 700 (Ill. App. 3d Dist. 2000).

[5] The district court's jurisdiction in the present case was based solely on federal questions under the Fourth, Eighth and Fourteenth

(Continued on following page)

elaborates on the basis for *Waggner's* holding or even cites it. In fact, over sixty years after its opinion in *Waggner*, the Louisiana Supreme Court again considered one of the statutes at issue in a different context. In *State ex rel. Grosch v. Echezabal*, 58 So.2d 398 (1952), the criminal sheriff of Orleans Parish and the judges of its criminal district court contested which of them was the proper party to receive the release fee, yet the court never cited its prior opinion in *Waggner* nor otherwise suggested the fee was not collectible.

Second, post-*Waggner* legislatures have repeatedly amended and reenacted the bail bond release statutes at issue without significant substantive change. Under well settled Louisiana rules of statutory interpretation, this action represents permissible legislative action to overrule its holding. *State v. Gomez*, 778 So.2d 549, 554 (La. 2001).

Third, even if *Waggner* can wildly be construed to have announced a principle of federal constitutional law, it would not be binding on any federal court later addressing the same question. *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 78 (2000), citing *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940).

Fourth, Louisiana is unique among the states as a hybrid civil law/common law jurisdiction. Under its own rules of decision, even the most definitive opinion of its supreme court has no *stare decises* effect as true precedent. "The supreme expression of legislative will in Louisiana is of course the codes and statutes." *In re Orso*, 283

Amendments; supplemental jurisdiction over any related claims arising under state law was never asserted.

F.3d 686, 695 (5th Cir. 2000), quoting *Winstead v. Ed's Live Catfish and Seafood*, 554 So.2d 1237, 1242 (La. App. 1989). In cases involving application of Louisiana laws, a federal court is only guided, not bound, by decisions of Louisiana courts. *Transcontinental Gas Pipe Line Corp. v. Transportation Insurance Co.*, 953 F.2d 985, 988 (5th Cir. 1992). The Louisiana Supreme Court itself recognizes this principle of construction. *Doerr v. Mobil Oil Corp.*, 774 So.2d 119, 128 (La. 2000).[6]

CONCLUSION

Petitioners' argument for bail bond "reform" is properly directed only to the Louisiana Legislature and to the citizens of Louisiana who would be responsible for subsidizing its implementation. The Petition should be denied.

Respectfully submitted,

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[6] *Doerr* also recognizes that Louisiana's analogue to *stare decisis* is *jurisprudence constante*, in which persuasive authority arises only from a long line of consistent rulings. *Id.*